SEE
FOLLOWING
NOTE

VOIR
NOTE
CI-APRÈS

PARTS OF THE ORIGINAL DOCUMENT
ARE OF POOR REPRODUCTIVE QUALITY

CERTAINES PARTIES DU DOCUMENT ORIGINAL
SONT DE PIÈTRE QUALITÉ DE REPRODUCTION

87-04401/

[redacted]

DANIÈLE GAGNON

HISTORY OF THE LAW FOR JUVENILE DELINQUENTS

No. 1984-56

This working paper was prepared under contract for the Research Division and is made available as submitted to the Ministry. The views expressed are those of the authors and are not necessarily those of the Ministry of the Solicitor General of Canada. This working paper may not be published, cited or reproduced without permission of the Ministry.

This working paper is available in French. Ce document de travail est disponible en français.

CONTENTS

Introduction 1

Chapter I: Methodology 8

Chapter II: Historical development of the law for juvenile delinquents 19

- 1857 21
- 1859 24
- 1869 24
- 1875 26
- 1886 26
- 1892 27
- 1894 27
- 1908 30
- Changes to the act of 1908 41
- Major changes to the 1929 act, up to the present 47

Chapter III: Analysis of the development of the law for juvenile delinquents 51

- Philosophy 52
- The juvenile court 70
  - The origins of youth courts and their development 70

IV

Material jurisdiction of the court: delinquency 76

Personal jurisdiction of the court: the juvenile delinquent and adults 82

Extent of the court's jurisdiction 93

The participants 96

Lawyers 96

Police 99

Parents 101

The court and the judge 103

Social agencies 108

Procedure 115

Rights of the child and due process of law 115

Pre-hearing 120

The hearing: from appearance to ruling on guilt 126

Dispositions 131

Appeal 145

Chapter IV: The present law 148

Philosophy 149

The participants 150

The juvenile court 155

Procedure 156

The pretrial period 158

The trial 160

The final disposition 162

Conclusion 164

V Appendix A: Chronological listing of reports, conferences and bills, respecting juvenile delinquency 170

Appendix B: Chronological listing of the acts respecting juvenile delinquents 173

Appendix C: Listing by dates of House of Commons and Senate debates on the law respecting juvenile delinquents 176

Appendix D: The analytical grid 179

Appendix E: Excerpts from The British North America Act and the Canadian Bill of Rights.. 182

Appendix F: Jurisprudence 185

Appendix G: The act of 1857 187

V Diagram of the Juvenile Delinquents Act process ... 197

Bibliography 199

* * * * * *

This paper attempts to provide the reader with a historical account of our law for juvenile delinquents. This law, which has its origins in an act of 1857, has been the subject of much discussion over the years, and continues today as a focus of interest for those involved with the problems of the young. Included below are an explanation of the method I have used, a chronological history of the law, and an analysis of its historical development.

The reader will note in the chapter on methodology that I have had to limit my study in time: the period chosen for examination is that from 1857 to 1973. I have also had to limit myself in terms of documentary sources, and have elected to use only those of an official nature: House of Commons and Senate debates, the federal acts respecting juvenile delinquents, the reports of federal-provincial committees on juvenile delinquency, certain briefs presented by social agencies in parliamentary committee, and various judicial decisions handed down by our courts.

I put together an analytical grid embracing a variety of subjects to help me in collecting and classifying the relevant data. The subjects were grouped under four main theme headings: philosophy, participants, the juvenile court, and procedure. These themes are examined from a developmental viewpoint that attempts to discover the reasons for the changes that occurred, and the basic philosophy behind them.

The chronological history begins with the provisions of the pioneer act of 1857 and goes on to look at the main changes that have occurred since that time as the law was reworked and amended.

The analysis of the law's historical development looks again at the central provisions and most important changes and tries to elicit the basic ideas that lay behind them. What, for example, was the thinking behind the creation of the juvenile court? In short, this chapter is an attempt to isolate the philosophy behind the development of legislation for juvenile delinquents from 1857 to our own time, on the basis of such carefully worked-out themes as the participants, and the youth court itself.

Finally, this paper offers a description of the Juvenile Delinquents Act currently in force.

Programs
Branch

User
Report

HISTORY OF THE LAW FOR JUVENILE DELINQUENTS

No. 1984-56

Introduction

2 Since the days of the notorious Bill C-192 in 1971, many thousands of words have been addressed to the subject of justice for minors. Not yet enough of them, however; our historical literature on the handling of juvenile delinquents is still sparse in this country. It seems only in the last few years that criminologists and lawyers and sociologists have been showing an interest in how Canada's juvenile justice system developed, and bringing a little light to bear on the process. It has been the subject of a few articles now, all of them published in the seventies. Some of the writers have taken a general approach, while others have fastened on specific points.

Those selecting the first approach have confined themselves to a few general observations. For example, Préfontaine (1975), after some remarks about the background of the system for minors, gave most of his space to the present (1970) act, with a few comments on the rights of minors. Other articles have gone into greater detail, without focussing on any particular point. Houston (1972) has examined the Victorian ancestry of our justice system for minors and shown how we moved from a system driven by
3 high philanthropic, moral and religious intentions to an organized, institutional system that called for the presence

of specialists. Conly (1976) has focussed on the Ontario training schools, arguing that as a response to the problem of delinquency, these institutions are irrational; this response has been moulded by the moral values and ideological beliefs of the ruling classes, with no regard for the real needs of the delinquent. For Conly, the logical solution would lie, not in continuing to treat delinquents, but in combating, by a program of prevention and control, the factors that foster crime. This is why he has advocated doing away with Ontario's training-school network. In another article, Rivet and Marceau (1974) have examined the jurisdiction and procedure of the youth court.

These writers have all touched in one way or another on issues that will be raised in the present paper. What are the general philosophies that lie behind the various concepts of delinquency? What has been the influence of such social phenomena as industrialization and urban growth? And what have been the significance of the family and the state in the delinquency process?

4 Some writers have supplied elements of a solution. Sutherland (1976) has emphasized the importance of urbanization and the simultaneous destructuring of the family as factors in the growth of delinquency; Conly (1976) has challenged the effectiveness of the institutional system for juvenile delinquents.

Several of these articles have an Ontario focus. The development of the justice system for minors has been viewed by Steward (1971) and Leon (1975) chiefly in terms of the emergence of institutions for minors in Ontario. Conly's 1976 paper also deals with the Ontario scene.

Thus far, no survey has probed all the aspects of the justice system for minors in Canada. Nor am I making any claim to have done this; what I have attempted to do in this paper is build a general picture of the evolution of justice for minors in this country through an examination of one of the main laws affecting this group, the law for juvenile delinquents.

My choice of the federal law for juvenile delinquents has been dictated by two facts: criminal legislation falls within the federal jurisdiction, and as a federal law, the law for juvenile delinquents is in force in almost all provinces of Canada. [1]

What follows, then, is the history of the law for juvenile delinquents. It contains not only a chronological account of the successive pieces of legislation, beginning with the first act, but also my interpretation of the changes that have come about as a result of evolution in philosophical, social and legal concepts. The examination of the laws themselves has been completed by study of the related official documents. [1]

---

[1] The Juvenile Delinquents Act does not apply in the province of Newfoundland. Newfoundland applies its own law, the Child Welfare Act, dating from 1944. It has remained in force under the agreement surrounding Newfoundland's entry into Confederation in 1949.

As I have already stated, this is not an exhaustive study of the laws regarding minors. It is merely one element in a broader investigation that must go on to include the development of provincial laws for the establishment of courts and institutions for minors, and for child welfare and protection.

So extensive a study would require consultation of a number of documents: the provincial laws regarding reformatories and youth protection, and also certain by-laws of municipalities. Newspapers could also be useful as supplementary sources, particularly for those periods when there was a paucity of organized groups to present briefs before parliamentary commissions or committees, and when there were no such parliamentary bodies in existence.

The present study is divided up as follows. The methodology is outlined in Chapter I. Chapter II gives a chronological account of the law, together with a description of the main changes that have occurred in it. The main part of the work, analyzing the development of the law for juvenile delinquents, is in Chapter III. Before the Conclusion, a final chapter offers an overview of the present act and how it works.

---

[1] These are the House of Commons and Senate debates, the proceedings of parliamentary committees, and briefs presented to the committees by outside agencies. The reader will find detailed lists of these in Appendices A and C.

Acknowledgment

The writer wishes to extend thanks to the Ministry of the Solicitor General of Canada for co-operation that was of immense service in the preparation of this document. Thanks go also to Jean Trépanier, who as interim director of the ministry's Research Division made his assistance available to the writer.

Chapter I

Methodology

9 The aim of the present paper may be defined in terms of sociological, historical and legal analysis. In tracing a law's development, we must turn to a variety of approaches — the legal approach, certainly, but also the social and the historical. The narrowly legal approach used on its own would have turned this into a technical paper. I have elected to probe my subject's social and historical dimensions as well, to be able to include the currents of thought and the shifting philosophies behind the changes that have occurred in the law over the years.

In order to proceed effectively, I have had to limit myself as to the period surveyed and documentary sources used. The period chosen extends from 1857 to 1973. The starting date is that of the passage of the first piece of legislation. I have settled on 1973 as my terminal date for the reasons that follow. It was in that year, in the wake of the failure of Bill C-192 (see Appendix A) that the Solicitor-General of Canada created a special committee to draft a new young offenders act. Formed of persons from a mixture of disciplines, this committee delivered its report in 1975 under the title Young Persons in Conflict with the Law (see Appendix A). This document

10 was submitted for public reaction and afterwards modified.

It is now to serve as the basis for a piece of legislation to replace the current law. This new bill should be introduced quite soon. However since the report has not become law or even been presented to the House of Commons, it is hard for me to include it in my analysis; its provisions could well end up being altered. It also seems right to me that some time should pass before the report can be subjected to analysis. Time will produce a better perspective on the relevance and effectiveness of the changes proposed. This, then, is my argument for the period selected for study.

My documentary sources have been restricted to the official ones. These are the various federal acts respecting juvenile delinquents (listed in Appendix B), and debates of the House of Commons and the Senate on this matter (see Appendix C), reports by federal-provincial committees on delinquency and certain agency briefs presented to the parliamentary justice committee (Appendix A), and (Appendix F) certain judicial rulings from our youth courts.

Once the period and the sources had been decided on, 11 the question of procedure arose. Given my aim in this paper, two analytical approaches seemed appropriate: the chronological, that is period by period, and the thematic. I have opted in favour of a thematic analysis, with four main themes: philosophy, the participants, the juvenile court itself, and procedure. This does not mean that the perspective of time has been excluded, however, for each of the themes is developed chronologically.

For the purpose of collecting and classifying the relevant data, I then drew up an analytical grid based on my themes. The reader will find the complete list of subject headings making up this grid in Appendix D. I made the list as exhaustive and as exclusive as possible. Once the data were collected and organized under themes, I then examined them from a developmental perspective, trying to explain the changes I saw occurring and discover the philosophies behind them.

I think that it is suitable at this point for me to offer fuller explanations concerning my choice of themes, and define a few terms that occur throughout this paper.

2

The themes: philosophy

One dictionary definition of philosophy calls it "an overall concept, a more or less systematic view of the world and the problems of living." This definition comes the closest of any to my own perspective. Under the theme of philosophy 1 have attempted to bring together the concepts of delinquency that have predominated in various periods, as well as those principles that have been used to justify certain changes in attitude, and the concept of intervention which was their result. Behind the juridical terms of the statute books, I have tried to isolate the mentality of the men who conceived them or urged them into law.

The participants

These include lawyers, police, parents, the judge, and the social agencies connected with the court. My aim has been to show what role lawmakers have assigned them since this law began; how they have gradually been involved or taken for granted in the process of developing procedures for dealing with delinquent juveniles; the nature of their commitments, and so forth. I have also hoped to reveal how decision-making power was divided among all these groups.

The minor himself is not included in the list of participants. Since he is the chief interested party, the reader may well ask why. In fact the legal provisions discussed from one end of this paper to the other concern the minor directly, in terms of philosophical background as well as of the court's jurisdiction and procedure. At the same time, I have not felt it necessary to repeat what emerges under the various theme headings. The role given the minor by the lawmaker becomes clear from the whole.

The juvenile court

The two main points focussed on under this theme heading are the court's origins and historical development, and its jurisdiction. The first of these is dealt with only briefly, for as we know, the business of setting the court up — appointing the judges, general operation, and so on — falls within provincial jurisdiction.

14 I have dwelt mainly, then, on the second point, the jurisdiction of the court. I have split this into its material and personal aspects. Material jurisdiction has to do with the matters that come within the powers of the court. Here, we have to consider the definition of a delinquency offence and delinquency in general, working from the definition of a juvenile delinquent. Personal jurisdiction has to do with those brought before the juvenile court, minors and adults. I have looked at the issue of the age of legal responsibility and the range in this sense of the court's jurisdiction.

Procedure

The agenda under this theme begins with the general issues of due process of law and the rights of minors. Then we move on to procedure, following as closely as possible the order in which events occur in the court. The various stages are listed in Appendix D.

Certain subject headings under this theme call for clarification:

15

- Trial covers everything that enters the trial process, including the rules of evidence, such as the rules governing testimony, fingerprinting, and the admissibility of confessions.
- Confidentiality includes everything that has to do with publicity, in-camera proceedings, and the records of the juveniles.
- Ruling on guilt and ruling on final disposition — I have felt it best to separate these two decisions of the court. Are they made by the same person? If so, would it be desirable for them to be made separately, and by different persons?
- Dispositions are either temporary or final. A temporary disposition is any disposition made during the proceedings before the court makes its final disposition. A temporary disposition may be made before trial (the granting of bail, for example) or during trial, as in temporary detention. The final disposition is that made once guilt is established, since as a rule, if the accused person is not

16

found guilty, he will be released.[1] The final dispositions are listed in the act. *Transfer*, the disposition by which a case is sent by the juvenile court to the ordinary courts, has been made a separate subject heading. Its significance as a special disposition that can be made during trial as well as after the trial is over puts it in a category of its own.

---

[1] I have said "as a rule," since the person may then be dealt with under a provincial youth protection act and be subject to dispositions similar to those found in the Juvenile Delinquents Act.

The following are some definitions that I have felt it necessary to include here in order to avoid confusion or looseness in the body of the paper.

'7

- *Adjournment sine die* is an adjournment or postponement of a case until such time as the judge in his discretion sees fit to resume it.
- *Court* refers in this work to the juvenile court as defined in the Juvenile Delinquents Act, unless otherwise specified.
- *Court of appeal* refers to the court of appeal for criminal cases in each province; this is the court that hears appeals from decisions of the provincial supreme court.

  The *supreme court* is also a court of appeal; this is the court that hears appeals from decisions of the juvenile court. This term refers to the provincial supreme court, except in Quebec, where it refers to the superior court.
- *Due process* means "a course of legal proceedings according to the rules and principles which have been established in our systems of

jurisprudence for the enforcement and protection of private rights."[1] Examples include the right to testify, the right to cross-examine witnesses, the right to be present at the hearing, and the right to a full and complete defence.

- Hearsay, or hearsay evidence, is something not known directly by a witness, but only heard of; in criminal law, this is evidence given by witnesses relating what they have heard others say.
- Jurisdiction, material and personal.

  Material jurisdiction refers to the court's power to examine and rule on the substance of the charge. The juvenile court has the exclusive power to examine offences of delinquency by minors.

  Personal jurisdiction refers to the court's power over the person of the accused. It is exercised in terms of the defendant's age, the court's adjournment of proceedings, and the type of trial chosen by one accused of a criminal act.

---

1. Black's Law Dictionary: West Publishing Co., 4th ed., 1968, p. 590.

18

- Larceny -- In 1857, the rules of criminal law were modelled on the common law. The common law categorized crimes as crimes of treason, crimes of felony, and misdemeanours. Crimes of treason included crimes against the state; crimes of felony included most serious crimes and were usually punishable by death; misdemeanours included the less serious offences, and larceny was probably one of these.
- Transfer refers to the juvenile court's waiver of its own jurisdiction in favour of the ordinary court.

Chapter II

Historical development of the law for juvenile delinquents

20 The intention in this chapter is to provide an overview of the federal law for juvenile delinquents and indicate how this law has been changed over the years. Every piece of legislation is introduced below, in a degree of detail that reflects the importance of the changes it expressed. My analysis will dwell on only the most significant of these changes. A list of the relevant legal texts will be found in Appendix B: their dates are 1857, 1859, 1869, 1875, 1886, 1892, 1894, 1908, 1912, 1914, 1921, 1924, 1927, 1929, 1932, 1935, 1936, 1947, 1949, 1951, 1952, and 1970.

Two of these dates, 1857 and 1908, emerge as particularly noteworthy. The earlier is that of the first juvenile delinquents act. Since this pioneer date in our law for juvenile delinquents is not usually mentioned, I have felt it importance to outline the act in some detail. In the second year, 1908, the law was radically altered. Working from the American model, Canadian lawmakers created a specialized court and ushered in a fresh approach to the antisocial behaviour of delinquent youth.

21 The year 1929 is frequently cited as an important one. In my own view, it is less significant than we have always been led to believe. It is certainly true that 1929

saw the results of an important federal gathering of youth-court judges and persons involved in social reform; the 1908 act underwent a thorough re-examination, and there were various changes that will be described in this chapter. The only major innovation of 1929, however, was the creation of a court of appeal and an appeals procedure for youth-court decisions. This is not enough, in my opinion, to warrant the importance the year is given.

1857

The first piece of legislation was entitled An Act for the more speedy trial and punishment of juvenile offenders. Its preamble, expressing the lawmakers' general thrust,[1] announced the intention of accelerating the trial process for juvenile delinquents and sparing them a lengthy imprisonment before trial. Acceleration was to be achieved through the use of summary hearings; the granting of bail in more cases would avoid the long imprisonment of juveniles before trial. It would seem that prior to this act, juvenile delinquents were tried in the same way as adults, by English legal procedure as applied in Canada, and liable to the same penalties.

---

[1] The preamble of a law does not have the force of law; it is simply an expression of intent.

The 1857 act (ss. 1-3) defined a juvenile delinquent as someone under age 16 who was guilty of an offence deemed or declared to be simple larceny, or punishable as simple larceny. An information against a juvenile delinquent could be brought before a justice of the peace on the oath of a credible witness (s. 6).

In consequence of the issuing of a summons to appear or warrant to summon or apprehend, the delinquent made an appearance before two justices of the peace to reply to the charge (s. 6). He was then remanded for further examination or trial, and imprisoned for the waiting period in either case. The justice of the peace could also (s. 1) decide to free him on bail.

The eventual trial took place before two or more justices of the peace. It was summary unless transferred to the ordinary court. The decision to transfer could be made by either the justice of the peace or the accused (ss. 1 and 2).

The sentence could be either imprisonment in a common jail or house of correction, with or without hard labour, for a term not exceeding three months, or a fine not exceeding £5 (s. 1). In addition to this sentence, the accused could be ordered to restore the stolen property or pay equivalent compensation (s. 14). If his guilt went unproven or the justices decided that punishment was unnecessary, he could be set free. In this case, the discharge could be ordered with or without sureties, and the justices could also order restitution of the stolen property or equivalent money compensation (ss. 1, 14).

I feel that it is of some interest to mention the concluding provisions of the 1857 act, which have to do with victims, prosecutors, and witnesses. At the justices' discretion (ss. 16-17), reimbursement could be made to prosecutors and all others who were called on to appear in the case. Victims and prosecution witnesses could be allowed a certain sum of money against their expenses for appearing or otherwise carrying out their prosecution, and also as compensation:

> The Justices of the Peace ... are hereby authorized and empowered, at their discretion, ... to order payment to the prosecutor and witnesses for the prosecution of such sums of money as to them shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have incurred in attending before them, and in otherwise carrying out their prosecution, and also to compensate them for their trouble and loss of time therein ... (s. 16)

This could apply even where the accused was not found guilty. Police constables and other peace officers could also receive compensation for arresting and detaining the accused.

2½'

1859

There was a reorganization of the statutes of Canada in this year. The only changes to be noted here are the disappearance of the 1857 preamble, and a new title: An Act respecting the trial and punishment of juvenile offenders.

1869

The 1869 act has no preamble. The only change of note has to do with the freeing of the accused. The justices could decide that it was inexpedient to punish him, or he could be freed on bail. When guilt was not proven, he was freed without bail.

Dealing with the transfer of juvenile cases, section 5 added a new element:

terinal

> ... but this shall not prevent his being afterwards tried summarily by his own consent by a Judge of a County Court in the Province of Ontario, under any Act then in force for that purpose.

Another act respecting juvenile delinquents, applying this time only to the province of Quebec, was
26 passed in the same year. Its purpose was to bring the provisions of the juvenile offenders act into line with the new provincial legislation on Certified Reformatory Schools. The changes were mainly in the area of sentencing.

Under the federal act, delinquents were confined to reformatory prisons for terms not exceeding three months, with or without hard labour. This provision continued to apply in Quebec except for hard labour, which was no longer in effect there. There was, however, a new supplementary provision: at the end of his prison term, the juvenile delinquent was to be transferred to a Certified Reformatory School for a period of two to five years. It was also possible for the juvenile to receive no prison sentence at all, but only the two-to-five-year term in a Certified Reformatory School (s. 2).

Hard labour could still be imposed over and above the three-month maximum prison sentence in cases where the delinquent refused or neglected to obey the rules of
27 the school or ran away from such a school. This sentence was added to the original sentence, and once it was served the delinquent returned to the school for the part of his period of detention that had been unexpired

at the time of his defiance or arrest (s. 6). Whenever possible, juveniles awaiting trial were to be detained in reformatory schools (s. 5).

This act also created a new class of delinquents: the incorrigibles. A delinquent convicted of felony and confined to a reformatory school could, by order of the lieutenant-governor (s. 4), be removed as incorrigible to spend the rest of his sentence in a penitentiary. Thus, 1869 brought changes in sentencing.

1875

The act on procedure in criminal cases [1] was amended in 1875. The ordinary courts could now sentence a 16-year-old delinquent to provincial reformatory school instead of the penitentiary. The school sentence had to be not less than two and not more than five years in length. Sentences of over five years had to be served in penitentiary.

1886

This was a reorganization year that brought no major change.

---

1. An Act to amend the Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law (S.C. 1875 c. 43).

1892

The Criminal Code was passed in this year. The provisions for juvenile delinquents were put together in Part LVI (ss. 809-831): Trial of Juvenile Offenders for Indictable Offences. They echoed the 1869 act.

Three other sections of the Criminal Code — 9, 10, and 550 — had to do with juvenile delinquents. Section 9 set the age of criminal responsibility at 7, and section 10 went on to state that a child over 7 and under 14 years of age could not be held criminally responsible unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong. Section 550 concerned the trial of persons under 16: as far as seemed expedient and practicable, such trials were to be held without publicity, and separately and apart from those of other accused persons, at times suitable for this purpose.

1894

The preamble of the 1894 act announced the intention of keeping juvenile delinquents separate from older offenders and criminals during their arrest and trial, and sending them for detention to places where they could be reformed and taught to lead useful lives, instead of being imprisoned.

Section 550 of the Criminal Code was amended, and the phrase "as far as may seem expedient and practicable" replaced by a clear instruction that trials of persons under 16 were to be held separately and in accordance with the requirements of the law. This provision was made obligatory because legislators feared that the justices would set it aside as inconceivable and impracticable. [1] Also under the 1894 act (s. 2), juveniles were to be held in pre-sentence custody in places where there were no older persons accused of crimes and offences, or persons serving sentences of imprisonment.

20 Some of the act's provisions applied only to Ontario. They brought a new element to the law by introducing dispositions other than that — imprisonment — which had been available to justices up to this time. Under section 3, any child less than 14 years of age who was found guilty of an offence against a law of Canada and sentenced to imprisonment as the law required could be handed over instead to a home for destitute and neglected children, a children's aid society, or a certified industrial school.

---

[1] Canada, House of Commons, Debates, June 25, 1894.

Section 4 affected boys under 12 and girls under 13 who were charged with offences against the law of Canada. In these cases, the justice's first obligation was to notify the executive officer of the children's aid society in writing, and allow him an opportunity to investigate the charges. This obligation did not extend, however, to notifying the child's parents. Then, before disposing of the case, the justice had the option of consulting with the officer and the parents, and considering any report the officer had made. If in the justice's opinion it was in 21 the public interest and for the child's own welfare, he could waive committal for trial and sentencing, and instead:

> a) authorize the said officer to take the child and ... bind the child out to some suitable person until the child has attained the age of 21 ... ; or,
> b) place the child out in some approved foster home; or,
> c) impose a fine not exceeding ten dollars; or,
> d) suspend sentence for a definite period or for an indefinite period; or,
> e) if the child has been found guilty of the offence charged or is shown to be wilfully wayward and unmanageable, commit the child to an industrial school, or to the provincial reformatory ...

Under this section, the justice had broad decision-making powers. He could choose any one of a, b, c or d for boys under 12 and girls under 13 even if they had not been proven guilty. It was enough that they had been charged with an offence against the law of Canada.

32

> If, after such consultation and advice, and upon consideration of any report so made, and after hearing the matter of information or complaint, the court or justice is of opinion that the public interest and the welfare of the child will be best served thereby, then, instead of committing the child for trial, or sentencing the child, as the case may be, the court or justice may ... (s. 4 (3))

1908

The juvenile delinquents act of this year automatically (s. 33) repealed any existing federal law that was incompatible with it. The fact is that it reiterated the Criminal Code provisions respecting such delinquents, adding to these a number of fresh elements. Whereas the titles of previous laws were filled with such terms as trial, punishment, arrest and imprisonment, the new law returned to the title used in 1886, a simple one: An Act respecting Juvenile Delinquents.

These provisions expressed a new philosophy of aid and protection for delinquent juveniles. The new concepts defined delinquency in terms of environment; the delinquent was the product of his environment.

33 Seen as victims of their environments, delinquents obviously did not deserve the same treatment as adult criminals; we had to devise a special procedure for them, and instead of trying repressive punishment, use paternal help and support. This was the spirit and purpose behind the new law.

Its passage is a turning point in our story. The act of 1908 created a court exclusively for juvenile delinquents. It detailed the goals that must direct dispositions in juvenile cases. It defined the criteria by which the juvenile court could waive its own jurisdiction in favour of the ordinary court. It admitted such specialists as probation officers and children's aid workers to advise, enlighten, and assist the juvenile court in its work. The importance of this piece of legislation has prompted the following breakdown.

Preamble

The act of 1857 pioneered with a preamble. The 1869 act for Quebec offenders had such a one, and so did the 1894 34 legislation that amended the Criminal Code and brought in new dispositions for delinquent juveniles. This was not the case with the other pieces of legislation.

The objectives stated in the 1857 preamble had already expressed the general intent to give delinquent juveniles special treatment; this intent seemed to grow more explicit in the text of 1894. It was not now a question of speeding up their trials and cutting back on their imprisonment, but of separating juveniles from older offenders and habitual criminals. One senses a desire for reform that flowed from a philosophy that was one more of rehabilitation than of punishment or correction.

The 1908 preamble drew on that of 1894. The delinquent was not to be classed or dealt with as a common criminal. This intent was reinforced later (s. 31) by the statement that the act was to be liberally construed to achieve its purpose: the care, custody and discipline of juvenile delinquents, misdirected children needing aid, encouragement, and assistance.

35

Definitions (ss. 2-3)

The new act contained a number of definitions that clarified the meanings of terms and in some cases dispelled unwanted ambiguities. Most of these definitions were fresh, arising from such new concepts as the delinquency offence and new provisions as the juvenile court.

One of these new definitions was of the juvenile delinquent. In previous law, the juvenile delinquent, and by the same token delinquency itself, were only defined indirectly. The law now specified any child, boy or girl under 16, who violated the law. All offences specified by law could be delinquencies: not only larceny as before, but also violations of the Criminal Code, federal or provincial statutes, and municipal by-laws and ordinances. These violations, the commission of which made a child a juvenile delinquent, were now to be known as "delinquency offences." The new term seemed to express the intent of the preamble: to stop treating juvenile delinquents as criminals, and let the new juvenile court give help to any child who needed it.

Exclusive jurisdiction of the juvenile court

The act created a juvenile court. Under section 92 (14) of the B.N.A. Act, the establishment of this court and the appointment of its judges were matters of provincial jurisdiction. The federal Juvenile Delinquents Act of 1908 gave this court exclusive jurisdiction where a child had committed a delinquency offence.

This juvenile court assumed a somewhat parental aspect. According to section 31:

> ... the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents ...

Tortuel

Transfer to the ordinary court (s. 7)

Under the 1857 act, such transfers could be decided by either the justice or the accused. In 1908, the choice became the judge's alone. It was he who decided as to the advisability and application of the procedure.

In 1857, moreover, it was provided that this decision must be made prior to the presentation of the defence, and that the justice must be of the opinion that in the circumstances, the charge justified proceeding by indictment. In 1908, there were explicit criteria: the transfer from one jurisdiction to another must, in the court's opinion, be required for the good of the child and the interest of the community. The child also had to be over 14 and charged with a criminal offence.

Notification of parents, etc. (s. 8)

Due notice of the hearing of the charge to the father or mother or guardian or, failing this, to a near relative, was now obligatory. A comparable provision (notice of the information) had existed since 1894, but it had applied in Ontario only, and was optional.

Notification of the probation officer (s. 9)

The clerk of the court was to notify the probation officer of the day the child would be appearing in court.

A comparable provision had been in force for Ontario since 1894, with the difference that notification was made to the executive officer of the children's aid society.

Place of trial, and publicity (s. 10)

The provisions of the 1892 *Criminal Code* (s. 550) were repeated in 1908, but with some new features. There was to be no report published of the trial or other disposition of a charge against a child; publication of such a report, containing the names of the child and his parents or guardian, had to be authorized by the judge. The law was also specific about where the trials of juvenile delinquents could be held: the judge's private office or some other private room in the detention home.

Detention (ss. 11-12 and 22)

From 1894 on, the law did not allow a juvenile delinquent to be held in custody before sentencing in the company of older offenders or common criminals. This provision was reiterated with some changes in the 1908 act (s. 11). The new act built on the old: juveniles were not, upon or after conviction, to be sentenced to or incarcerated in any place where adults were or might be imprisoned (s. 22). Children were to be held in detention homes where such homes existed (s. 12). Section 11, however, announced some exceptions to this. For custody, 39 these arose in cases where juveniles were being transferred to other courts or where the judge was of the opinion that a child over the age of 14 could not be safely confined in any but one of the prohibited places (s. 11 (3 and 4)). Exceptions could also be made when there was no detention home reserved for the exclusive use of children, and when the judge considered incarceration necessary to ensure the child's presence in court (s. 12).

Any person violating the general principle for detention pending a hearing was liable on summary conviction to a fine or imprisonment or both (s. 11 (2)). When sentences were being served, this principle did not apply in cases judged after transfer to an ordinary court.

Promise to attend (s. 12 (2))

Repeating the old provisions on bail, the 1908 act introduced a new provision: the promise to attend. This promise could be given verbally or in writing by a third party who became responsible for the child's presence in court. Thus, temporary liberty was made much more accessible. The text of the law seems to limit the use
40 of the promise to attend to cases in which, for want of a children's detention home, an arrested child would otherwise have to be held in a place where older offenders

The child's testimony (s. 15)

This provision was modelled on an existing criminal law provision. The juvenile court could admit the evidence of a child called as a trial witness even though the child did not understand the nature of the oath. Unless it was corroborated, however, this testimony could not result in a conviction.

Final dispositions (s. 16 (1))

This subsection listed the dispositions available to the judge once guilt was proven. The list was longer than in previous law, and largely repeated the Ontario provisions in the 1894 act (s. 4 (3)).

41 As already noted, the 1894 provisions were no less applicable in cases where children were not found guilty, but simply charged with an offence against the law of Canada, than they were when guilt was proven. It required that the child's guilt be established before the court could make any of the dispositions under s. 16 (1). This section stated:

textual

> In the case of a child proved to be a juvenile delinquent, the court may ...

In the 1908 act, the provisions for restitution of property or equivalent compensation had been removed, although under section 18, parents or guardians could be ordered to pay damages. Moreover, section 16 (5) was explicit about the two considerations that must govern the court's choice of disposition: the child's own good and the best interests of the community.

Wardship (new disposition, s. 16 (3))

Any child proven to be a juvenile delinquent became a ward of the court until he was discharged as a ward by 42 order of that court or reached aged 21. This provision was an important one, for it allowed the court to order the return of the child at any time during the wardship period and take further or other proceedings in the case.

Parents (new disposition, ss. 16 (2) and 18 (2))

The court had certain obligations to parents, such as notification of the hearing; equally, parents had obligations to the court. The 1908 act gave the court the power to compel parents to contribute to their child's support when he or she was placed outside the home by court order (s. 16 (2)).

The act also empowered the court to make them pay any fine, damages, or costs that might be imposed on a convicted juvenile, when in the opinion of the court they had, by negligence or otherwise, contributed to the committing of the offence (s. 18). Here, the burden of proof fell on the parents; to exonerate themselves, they had to

43 prove to the court's satisfaction that they had not so contributed:

> Textuel
>
> ... unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or otherwise. (s. 18 (1))

The court could also require parents and guardians to give a security for the child's good behaviour when he or she was charged with an offence (s. 18 (2)).

Presence of children in the court (new disposition, s. 20)

Except for the person charged, a witness or an infant in arms, no child was permitted to be present in court.

Assistance to the court: juvenile court committees and probation officers (new dispositions, ss. 23-28)

The act put these functions in place to watch over the best interests of the child. The juvenile court committee, whose members served without pay, was usually the committee of the local children's aid society. Where no such committee existed, the court created it by calling on three citizens. The juvenile court committee's role was to meet and in consultation with the probation officers, suggest what the judge might do in delinquency cases (ss. 23-24).

44 Probation officers were normally appointed by the province, or, failing this, by the court. Their duty was to represent the child's interests before the court while at the same time working as investigators for the judge (ss. 25-28).

-Given the source of their appointments and the duties to the court imposed on them by the act, it is more than likely that probation officers and juvenile court committees found it somewhat difficult to perform the functions assigned them by the act.

Adults contributing to delinquency (new disposition, s. 29)

For the first time, contributing to delinquency was named as an offence. The offence of aiding an escape introduced in the act of 1869 was not the same as that of contributing to delinquency.

Prosecution of adults (new disposition, s. 30)

Prosecutions against adults for all offences against the provisions of the Criminal Code in respect of children could now be brought in the juvenile court.

Respect for provincial statutes (new disposition, s. 32)

45 Where an offence, other than an indictable offence, committed by a juvenile delinquent, could be prosecuted

under this act or a provincial statute, either course could be chosen in accordance with the best interests of the child.

Putting the act in force (ss. 34-35)

The act could be put in force by proclamation in any city or town or other portion of a province, providing the Governor in Council was satisfied that proper facilities had been provided. These could be provided by either the province or the municipality. Writing in 1908, Senator Scott defined proper facilities as a detention home for temporary custody of juvenile delinquents, an industrial school, an already-appointed juvenile court judge, and the establishment of a probation system and a society or committee acting as a juvenile court committee.

Changes to the 1908 act

There have been some changes in the law since 1908. Only the major ones are described below. -

46

1921

An amendment passed in this year raised the age limit for juveniles from 16 to 18 in provinces where the Governor in Council confirmed the change by proclamation. In these provinces, then, the juvenile court's jurisdiction was extended to all under age 18.

Other changes were brought in by the 1921 legislation. There was a new provision for adjournments. The court could now postpone or adjourn the hearing of a charge of delinquency for whatever period it deemed advisable, or it could adjourn the hearing _sine die_. This procedure must not be confused with the provision in section 16 of the 1908 act for the adjournment of the hearing of a case. Under the old law, the court could adjourn the hearing of a case for a determined or undetermined period. This adjournment was one of the dispositions available to the court once guilt was established. The question of proven guilt did not enter into the 1921 adjournment of the hearing of the charge, for the case had not been heard.

1924

47

The concept of delinquency was extended to include a new offence, sexual immorality or any similar form of vice.

As well, section 16 of the 1908 act on final disposition was reworked to increase the discretionary powers of the court, which could now, once the child was proved to be a juvenile delinquent, textual

> impose upon the delinquent such further or other conditions as may be deemed advisable. (1924, s. 2)[1]

The purpose of the amendment was to ensure the permanent entrenchment of certain rights, such as the right to restitution which had previously been open to challenge.

There was also a change in the provision for adjournment, part of the 1908 section 16 on dispositions available to the judge once guilt was proven. Once a child was proven to be a juvenile delinquent, the court could now in its discretion adjourn not only the hearing but also the disposition of a case for a determined or undetermined period.

4:2

1929

The 1929 legislation incorporated the suggestions of the Canadian Council of October, 1928, which brought together juvenile court judges and other persons involved in social reform from across the country.

Definitions (s. 2)

Among the new definitions were those of superintendent, magistrate, court of appeal, and supreme court judge. In addition, the definition of child now stated that the proclamation of the juvenile age limit by the Governor in Council could apply to boys only, or to girls only, or to both boys and girls. This meant that the age of delinquency was no longer identical for boys and girls. It will be noted that for Ontario only, the 1894 act had set the ages below which the court had to notify the children's age society at 12 for boys and 13 for girls.

---

[1] In the French text of the 1924 final disposition clause, the words à discrétion appear: thus, once guilt was established, the court could, à discrétion .... The English text of 1924 did not contain this expression.

49 Treatment of the juvenile delinquent (s. 3 (2))

A new subsection in the definition of a delinquency reinforced the already established philosophy: the juvenile delinquent must not be dealt with as an offender or a criminal, but as a person requiring help and guidance and proper supervision.

Jurisdiction of the court (s. 4)

This new section in the 1929 legislation specified that the juvenile court's jurisdiction was established by the person's age at the time the delinquency was committed, and not at the time of the information or charge.

Summary trial (ss. 5 and 35 (2))

Powers of the clerk (s. 11 (1))

The clerk was given new powers to administer oaths, and in the absence of the judge and deputy judge, to adjourn a hearing for a period not to exceed 10 days.

Newspaper publication (s. 12 (3 and 4))

The previous restrictions on newspaper reporting were extended from charges laid against children to include any charges against adults brought in the juvenile court.

In addition, the ban on reporting without the court's permission now extended to all newspapers and other publications anywhere in Canada, whether or not the act was otherwise in force at the place of publication.

Parents and guardians (s. 22 (1))

It will be remembered that the legislation of 1908 gave the court the power to compel parents and guardians to pay any fines, damages, and costs that might be imposed on a juvenile delinquent, when in the court's opinion they had contributed to the child's delinquency by negligence or otherwise. It was up to the parents or guardians to prove their innocence. They were liable, in the words of the 1908 act (s. 18 (1)),

> unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or otherwise.

In the 1929 legislation, the burden of proof was reversed. Under section 22 (1):

textual

> the court may, if satisfied that the parent or guardian has conduced to the commission of the offence by neglecting to exercise due care of the child or otherwise ...

51 For all practical purposes, it was now up to the Crown to persuade the judge that the parents or guardian had, by negligence or otherwise, contributed to the delinquency of the child.

Return to court (s. 20 (3))

It will be recalled that the 1908 act made the juvenile delinquent a ward of the court until he or she reached age 21 or was discharged as a ward by order of the court. This provision allowed the court to order the child returned before it at any time during the period of wardship, and institute further or other proceedings in the case.

In ordering a juvenile delinquent's return, the court was in a sense exercising its role as guardian. The 1929 legislation rehearsed the provisions of 1908, and then added a list of dispositions available to the court in cases of return. These were:

- -- any of the final dispositions as in the previous law,
- -- transfer to the ordinary court,

-- discharge of the child on parole, or
-- release of the child from detention.

52 The juvenile court committee (s. 28 (2))

This new subsection gave the committee, for the first time, the right to be present in court.

Appeals procedure (new disposition, s. 37)

This section gave the juvenile court its own appeals procedure. Appeals took place by special leave of a provincial supreme court judge and before a judge of the supreme court. Any juvenile court decision could be appealed. And there was a new right of appeal to the court of appeal, with the permission of that court.

Leave to appeal was to be given, at the discretion of the judge, only on extraordinary grounds, i.e. when it was in the public interest and for the due administration of justice.

Major changes to the 1929 act

In 1932, the law specified the deadlines for an application for leave to appeal: 10 days from the making of the conviction or order, or a maximum 30 days if the deadline were extended.

53 Since 1908, it had been an offence for an adult to

contribute to the delinquency of a child or contribute to his becoming a juvenile delinquent. The 1932 Legislation stipulated that it was not a valid defence that the child, despite the adult's behaviour, did not actually turn into a juvenile delinquent.

In 1935, a new section stated that it was no valid defence for an adult accused of having contributed to a child's becoming a juvenile delinquent that the child was too young to understand or appreciate the nature or the effect of the accused's conduct.

Minor changes were made to the law in 1936, 1947, and in 1951. It then remained unchanged in the Revised Statutes of 1952 and 1970, and is the same today.

In the sixties, however, committees were appointed by the federal departments of Justice and the Solicitor-General to develop a new juvenile delinquents bill. The Justice department's special Committee on Juvenile Delinquency began work in 1961. Its report, known as the MacLeod Report, was delivered in 1965. On the basis of the MacLeod Report, the Solicitor-General's department drew up the "First Discussion Draft for an Act respecting Children and Young Persons" (1967). This document adhered to the basic philosophy of the act of 1908; it represented a move towards greater formality, however, and contained several provisions that were similar to those of the Criminal Code. It created distinctions between age groups — children and adolescents — and offences — serious and minor. These distinctions were to govern the decisions of the court.

This draft legislation was the basis for Bill C-192, which was brought into the House of Commons on Nov. 16, 1970. The bill passed its second reading on April 6, 1971, and was sent to committee for study. It was never presented for third reading.

Bill C-192 followed the draft legislation in reaffirming the principles of 1908. It also opened up a number of new directions and new perspectives, and attempted to unite the paternalism that is inseparable from the application of the law with a more strictly-defined and better-codified judicial process. Procedures became more formal and explicit. The young person was treated increasingly as an adult. The bill offered such intriguing legal aspects as respect for the rights of the young person. There was more than one point of view to be considered, however. The bill's legalistic approach drew much criticism. It never became law.

Afterwards, another permanent committee was created by the department of the Solicitor-General. Its report, Young Persons in Conflict with the Law, was delivered in 1975. Still under study, it will eventually be presented as a bill to replace the current Juvenile Delinquents Act.

Chapter III

Analysis
of the development of
the law for juvenile delinquents

Philosophy

The law for juvenile delinquents can be seen as having developed through four stages. The first stage was that of 1857, with its goals of reducing penalties and speeding up proceedings in juvenile cases. In the second stage, 1869-1894, new provisions for juvenile offenders were accompanied by a concern for the separate detention of juveniles and adults. The third stage was that of 1908 and the triumph of state paternalism. The latest, from 1929 to the present, has had two salient features: one, increased interest in the social environment, and two, the phenomenon of diversion. The significance of the community's environmental role was to emerge in this period, and the social side of delinquency was stressed. There would be attempts to divert from the courts certain types of behaviour. Attention would fall on the judiciary as well, with demands for greater procedural formality and respect for the rights ot juvenile delinquents -- including the right to be represented by legal counsel, and to have the current rules of legal practice apply.

Let us begin with the earliest of these stages. Before the first legislation for juvenile offenders was passed in 1857, children who committed offences were apparently dealt with in the same way and under the same laws as adult 58 criminals. In accordance with the principle of equality before the law, delinquent juveniles were treated and considered as young criminals who had to be punished and led away from wrongdoing. Concern for the protection of youth was a development of the mid-nineteenth century, a time when moralistic Victorians discovered society's responsibility towards the underprivileged classes and the young.

Thus, the 1857 Act for the more speedy trial and punishment of juvenile offenders ushered in a new era for delinquent youth. Being the first piece of legislation makes it an important one. Its main intents were to accelerate the trial process for juveniles and spare them long pretrial detentions. Under other provisions of the act, the juvenile had to return stolen property or pay the money equivalent.

This legislation reflected the attitudes and experiences of the Canadian society of the day. Susan Houston's 1972 article is especially enlightening on the background.[1] 59 Canada had barely emerged from being an agricultural society and was moving slowly towards urbanization. This urban growth brought its share of such social ills as crime, ills that were compounded by the effects of immigration. For these years saw a large influx of newcomers who settled in the young cities; lacking resources and more often than not living on the edge of starvation, they provided an environment favourable to the increase of crime.

---

[1] Susan Houston dealt with English Canada of this time. I have chosen to use her opinions, however, since our criminal law comes from English law and is thus permeated by English attitudes. Moreover, Ontario was to be the source of a number of innovations regarding juvenile delinquency.

The Canadians, however, quickened by social conscience and morality, were not slow to react:

> They were self-conscious mid-Victorians ... they diligently unearthed the social problems that they knew, from the experience of Manchester, Boston, and elsewhere, must be there. [1]

Among these social problems, that of neglected and abandoned children did not fail to catch their attention. They saw these strays as obstacles to social progress. 60 They must step in and take matters in hand. It soon began to assume the proportions of a crusade to rescue the little ones and nourish them with the values of probity, hard work, and so on. For in the morality of the Victorians, the notions of character and conduct were as completely bound up with one another as those of ignorance and crime. The children's characters had to be changed, and they had to be educated and taught to work, if they were to be prevented from drifting into bad behaviour and ultimately a life of crime.

---

[1] Houston, p. 255.

textual

> A touchstone to Victorian morality was provided by the equation of conduct and character .... In this ideological context, the necessity to provide for neglected children could appear as a crusade to "civilize the street arab and convert the vagrant from the alarming vice of idleness to the habits of honesty and industry." The obvious existing institution that might transform the street arab was the common school.[1]

Another influence on the way society would deal with these juveniles came from the commission of inquiry into the penal system appointed in the 1850s. The inquiry was prompted by evidence of rampant brutality in the provincial penitentiaries. In the face of the revelations that seeped out, Canadians demanded not only the classification of prisoners but also more humane treatment for delinquent minors. Although we cannot refer to the influence of the commission's report, which did not see the light of day until 1899, the concerns were reflected in the act of 1857.

In fact, the 1857 act was permeated by the general concerns cited above: the desire to do something for juveniles in need of assistance, and most particularly the juvenile offenders. While recognizing the legitimacy of punishment,

---

1. Houston, p. 259.

the act attempted to mitigate it by two means: the granting of bail before trial, and the use of summary proceedings. This was truly a pioneer measure, one expression of the growing concern for minors in our society.

The second stage in the law's development was bounded by the 1869 delinquency provisions for Quebec and those of 1894 for Ontario. In a sense, these came as the continuation of the 1857 provisions. The main themes emerging in them were the family and the establishment of detention homes and reform schools.

There had been recognition in the earlier stage of the need to deal with juveniles, the emphasis being placed on the individual juvenile. Now, by degrees, there appeared what might be termed a complementary view, one based on the environment. If a young peron had become a delinquent or a stray, it was because he or she had lacked affection and the warmth of a family. Such a person, in order to be reformed, had to be exposed to salutary influences, which before they meant anything else meant home and family. For the Canadians of that day, home and family were crucially important as the first experiences of socialization.

> Belief in the capability as well as the necessity of education and training sustained the reform impulse. The family and home, in the sense that they represented the primary socializing experience, were central to the process. [1]

---

[1] Houston, p. 265.

And so the family, the basic cell of society, was seen as the most natural and fruitful environment for the rehabilitation of the young. This consideration was behind the creation of social institutions ranging from schools to prisons which emerged as complements, supplements and even as substitutes for the juvenile's own family. Homes were set up to bridge the gap between ordinary and reform schools. The authorities started these reform schools, and in Ontario in 1874, industrial schools as well.

In 1869, the federal Act respecting Juvenile Offenders within the province of Quebec formalized the functioning of reform schools in that jurisdiction. Certified Reformatory Schools already existed in Quebec, although in what numbers we do not know. Under the new act, a juvenile delinquent could be sentenced to one of these instead of a prison. It was also provided that a juvenile delinquent awaiting trial must be held in a Certified Reformatory School if such existed within a three-mile radius of the jail. Thus, there was concern that juveniles be held separately from adults.

These reform schools were intended to assume the family role, respond to the need to keep delinquent juveniles separate from older offenders and criminals and so protect them from being corrupted, and also to plant moral values in them. There was recognition of this in the 1894 act. Separation was required to prevent these young people, who were at a crucial age for their choice of virtue or wrongdoing, from falling under the pernicious influence of hardened offenders; they must be placed in surroundings where they could undergo a salutary and reforming influence. [1]

Similar provisions had existed in Ontario since 1893, the date of the Gibson Act or Children's Charter. This law followed several of the recommendations made by the 1890 Langmuir Commission on the province's penal and reformatory system. Children charged with offences against provincial statutes and municipal ordinances were to be detained separately from adults, and they were to be tried privately, wherever possible in places other than the police courts. With the passage of the Gibson Act, a number of children's aid societies were founded in Ontario. The emergence of this network of societies pushed the federal Parliament to pass the legislation of 1894 which, applying only to Ontario, authorized the children's aid societies to deal also with juvenile delinquents, i.e. juveniles who committed offences against federal statutes. The 1894 act also considerably increased the dispositions available to Ontario courts and justices

---

1. Canada, Senate, Debates, May 1, 1894.

55 in cases of juvenile delinquency, probation being an example. Even though they were restricted to Ontario, the 1894 provisions represented a real step forward: until this time, the only choices for the court when a juvenile delinquent was found guilty were a fine or imprisonment.

The third stage in the law's development, beginning in 1908, was characterized by state intervention and the entrenchment of a paternalistic philosophy of help and understanding for juvenile delinquents.

The notion of a family-style intervention had been gaining ground. The late nineteenth and early twentieth centuries saw an increasing number of social institutions for the young. Ontario installed an entire system of reformatories. It was pressure from social reformers and people who had started children's aid societies and reform schools that produced the 1908 legislation. Coming from the Senate, where it had been formulated, the bill was little debated in the Commons; it was regarded as a measure of general interest to the people of Canada, but no more significant than that. There had, however, been some lengthy discussion in the upper house, where it was sponsored by Senator Scott and introduced as a bill on
60 April 4, 1907. It did not get beyond second reading on

this occasion, but was brought back again in 1908, and on June 16, on a motion by Senator Béique, passed third reading and went to the Commons.

Though it was passed virtually unnoticed, this act would mean significant change. Gradually, it replaced the parents with the state. Writing in 1908, Scott declared that if the rights of parents over children were sacred, the right of children to grow up in a healthy atmosphere, liable to make respectable citizens of them, was greater still. Parents could therefore be deprived of their rights when they abused them, or used them inappropriately. Moreover, it was the duty of the state to take charge of children who had been subjected to bad influences, or whose education had been neglected. Here, then, was the state assuming the parental role, and removing children from the authority of their own parents.

The 1908 act managed this role change by delegating authority over juvenile delinquents to a court representing the state and assigned exclusively to this class of offenders. It encouraged the court in this role by extending the legal area of delinquency. No longer was the juvenile delinquent a child under age 16 and convicted of larceny; delinquency now covered any offence against the Criminal Code, a federal or provincial statute, or even a municipal by-law or ordinance (ss. 2-3).

67

In 1921, the state assumed an even wider authority when the age limit for juveniles rose, in those provinces desiring it, from 16 to 18 (s. 1); and in 1924, the definition of delinquency was broadened by the inclusion of a new offence -- sexual immorality or any similar form of vice (s. 1).

Among the principles laid down in the 1908 legislation are those mentioned by Kelso in 1907 and Scott in 1908: [1]

1. A child remains a child even if he has broken the law, and he must be treated as such and not as an adult criminal. In the same way that a child cannot dispose of his property, he must be held incapable of committing a crime.
2. The best way of rehabilitating juvenile delinquents is to entrust them to probation officers.
3. Adults must be held criminally responsible when they have contributed to the delinquency of a child.

67 Although there were some senators who claimed [2] to have statistical proof that delinquency was a throwback condition, and an indication of an individual's physical and mental inferiority, their theory found few takers. Rather, as I have stressed, delinquency was identified in an environ-

---

[1] Kelso, p. 109; Scott, p. 892.

[2] Canada, Senate, Debates, Apr. 22, 1907.

mental context. Hence, when a juvenile misbehaved, he had to be removed from the influence of his environment. And here the probation officers and committees attached to the court had a crucial role to play. The officer was involved at various times: before the trial, when he contacted the juvenile, met the parents, and could then even intervene to obtain a settlement without a court appearance; during the trial, when he reported to the court on the family, school, and state of the accused; and after the trial, since he was frequently ordered to help and assist the juvenile.

By adopting the expression "juvenile delinquent" as a uniform designation for any misconduct, serious or otherwise, the lawmakers drew attention to the offender and not to the offence. This made it possible to downplay the nature of the act and concentrate on the causes of the behaviour. With these goals in mind, the authors of the act introduced a new philosophy of help, an attitude of paternalism and wise, firm, inflexible benevolence; they steered clear of the repressive, punitive approach that had always dominated the language of the law, and laid the basis for new ways of dealing with juvenile delinquents.

69

The fourth and final stage to be noted here runs from 1921 to the present time. These years have featured the extension of the area of delinquency, the establishment of the right of appeal from decisions of the youth court, the appointment of various committees and commissions to study juvenile delinquency, and the arrival of the diversion phenomenon.

Change to the 1908 law on juvenile delinquents has been minor. As has already been mentioned, the acts of 1921 and 1924 added to the area of delinquency, the first by raising the age limit from 16 to 18 if provinces wanted this change, and the second by creating a new offence, sexual immorality or any similar form of vice. The 1929 act established the juvenile delinquent's right to appeal any decision of the juvenile court; its preamble voiced the concerns of benevolence and protection that we find in previous law.

The law may have set its goal as help to the young, and reinforced this with fresh concepts, but those applying the law have frequently taken a contrary, regressive approach. In 1936, for example, there were complaints in Ontario about the arrest of a number of juveniles in the north of the province who were simply there looking for work. [1] For all its philanthropic intentions, the law was loose enough in its definitions to leave the way open for abuse by persons who, in discharging their duties, use their power in a discretionary manner. The mere expression of a philosophy in law was not going to transform the thinking of those who applied it.

---

[1] Canada, House of Commons, Debates, June 7, 1935.

There is confirmation of this in the 1938 report of the Archambault Commission, which noted that despite the legal requirement that juvenile delinquents be kept separate from older criminals, a number of youths aged 16 to 21 were being held in provincial jails, some of them on a first offence. 71 The document also maintained that the annual reports of the penitentiaries commissioner for 1935, 1936 and 1937, recording the establishment of prisoner categories to ensure that juveniles were kept apart as well as the acceptance of this policy by penitentiary staff, were utterly misleading. The reality and these reports, the commission pointed out, were two quite different things.

The report also contained an interesting remark concerning the origins of delinquency and the treatment of juvenile offenders. Here, the Archambault Commission was profoundly representative of its time. Without rejecting the notion that heredity could have a part to play in the development of the criminal personality, the commissioners came out in support of the latest research on environment as a causal factor in delinquency. The child, then, no longer had to bear his guilt alone. Evidently the idea

72

had made some inroads since the close of the nineteenth century.

However, it stimulated little change in the law itself, and this meant a certain inconsistency. Though the law continued to focus on the individual, its provisions never attacked the environmental problem directly. If it did deal with the environment, it did so only very indirectly, by replacing parental authority with the authority of the court, and the family with social institutions. It was the course of less resistance, which avoided a frontal attack on the problem while leaving the impression that a solution had been found.

The 1960s produced a series of studies on delinquency as well as various draft bills and bills on the subject, listed in Appendix A. Interest in delinquency was growing; people in an increasing number of disciplines were looking at its causes, remedies, and prevention. Individual and environment were still seen together as explaining factors. Much more attention was given the environment — for it was not overlooked by the doctors — as a pathological factor liable to result in delinquency. The American war on poverty in the early 1960s included a number of delinquency-centred programs that aimed not only to deal with the young people themselves but also to foster awareness in, and better, their environments. This type of approach required

73 participation from both the juvenile and the community. Though I do not know what results these programs had, they indicated that an evolution was taking place: there was now a genuine effort to stop making individuals responsible for delinquency, and start seeing this responsibility as the community's. I am unaware whether comparable programs were launched in Canada, either federally or provincially.

The decade did, however, produce an evaluation of juvenile courts across Canada. This study concluded that the courts were not meeting the needs of their clients, the delinquent juveniles, effectively; and this applied equally to the needs of juveniles who had committed specific offences and the needs of those who had chosen anti-social conduct as a way of life. In response to the study, several systems were devised by which the resources of the community could be used to assist children and parents. These same years also saw the creation of a committee to examine juvenile delinquency in Canada and make recommendations to the federal government. Known as the MacLeod Committee, it handed up 100 recommendations in 1965. Among these was separation of the social and judicial aspects of treatment: the committee suggested that the court
74 deal only with the judicial side, leaving the social aspect, which should come under a non-punitive law.

Bill C-192, the product of long years of thought and research, was introduced in 1971. The MacLeod Committee recommendations of 1965 were used as the basis for draft legislation on children and young persons, on which in turn C-192 was based. The bill was presented by then Solicitor General Goyer as reconciling the judicial and social approaches. It attempted to meet the objectives of rehabilitation while still maintaining the procedural formality required for the due administration of the court.

This bill marked the beginning of the formalizing movement that continues today. An examination of some of its provisions will explain this statement. Delinquency was no longer defined in terms of a condition; it was defined in terms of specific offences against the law of Canada and any ordinance or regulation deriving from that law. In addition, informality of procedure and the juvenile court judge's broad discretionary powers were set aside. Thus, the provision for non-formality of procedure was abandoned. 75 Limits were established regarding non-warrant arrests, and procedures were defined for informations, summonses, and warrants. While not guaranteeing legal representation for juveniles, the bill did provide that children should be advised of their right to it. A pre-sentence report was required only in certain specific circumstances, for example if the child was to be placed in a home or a training school. In other cases, these reports would still be ordered at the discretion of the court. Bill C-192 also brought extensive regulation into the appeals procedure.

Its critics were unanimous in demanding the bill's withdrawal, their main argument being that it was actually a criminal code for children. The bill referred to a state of delinquency, which for many presumed a connection between delinquency and birth, whereas there was general agreement that it was linked instead with the child's environment and what had occurred since birth. For these critics, the bill represented a step backwards.

Bill C-192 seemed bent on punishing the juveniles and setting them apart. They would be tried and dealt with in terms of the offence charged. Of the principles upheld formerly, nothing remained: nothing about determinining an individual's needs, seeking the causes for his conduct, or even about asking for the help of the community. Despite its announced social objectives, the bill was seen by many 76 as repudiating the most progressive ideas that had been put forward up to that time: the idea that young persons, with exceptions, could not be held criminally responsible, and the concept of a social approach in which treatment must be individualized and effectively applied. The bill also attempted to define two conflicting roles to be assigned to the court, those of sentencing judge and supportive parent. Bill C-192 was eventually left by the wayside.

The year 1972 saw the creation of a federal-provincial committee that delivered its report in 1974. In modified form, this report was issued in 1975 under the title, Young Persons in Conflict with the Law. It continued in the course established by previous bills and reports, recommending the stricter definition of delinquency, together with the decriminalization of various acts and types of behaviour.

The uneasy balance to be maintained between the rights and needs of individuals on the one hand and society's protection on the other makes the lawmaker's task a difficult one, and most particularly in the field of juvenile delinquency, where there is general agreement that young persons cannot be dealt with as adult criminals are. We need new solutions, and perhaps the lawmaker ought not to be looking for them on his own. It is easy to pass harsh judgment on previous efforts, but we must see things as each era saw them, and not forget that today as yesterday, mankind advances by trial and error.

77

The Juvenile Court

78 The origins of youth courts and their development

The juvenile court emerged from a context of theory and practice that originated in England. In the eighteenth century, England had a court of chancery with exclusive jurisdiction in cases of neglected and dependent children. The Crown acted as "pater patriae" in the child's interest and name. This tradition found its way to the United States, for which England was at that time the source of criminal law. Its influence also reached Canada, though it came by way of the U.S.

The need for such courts was also perceived amid the negative side-effects of industrialization and rapid urban growth. These two processes produced overcrowding, weakened family ties, and thus led to an increase in vice and crime that did not exclude children. In reaction, there emerged a strong desire to save these children, protect them, and redeem them to healthy and useful lives by placing them in a suitable environment. At the same time, the growing sense of social justice urged a different
79 treatment of juvenile offenders from that given adults: they must not be punished, but held apart from mature criminals

and provided with a healthy environment. If families were incapable of these duties, they would have to be carried out by citizen groups. The state was poised to assume a guardian role, since it had the capacity for direct intervention, using its laws to administer and apply this emergent philosophy.

Various reforms preceded the creation of the court in Canada. These included, in 1894, the provision for separate detention of children from adult criminals and hardened offenders, the establishment of probation offices in Ontario, and in certain places (Toronto), separate juvenile hearings. We cannot date with certainty the pioneer child tribunal in North America. Stewart (1971) has reported that in the light of American experience, there were some unsuccessful attempts in Toronto in 1886 to set up a three-person commission to hear child cases. A similar commission had been created in 1861 in the American city of Chicago to rule on minor charges against boys under 17 and try to keep them out of reformatories. Unhappily, given the absence of federal legislation conferring the necessary powers, this system was unworkable in Toronto.

Finally, in the 1890s, a child court did appear in Toronto. There is some confusion as to its date. Kelso (1907 and 1908) has given 1893, adding that the court was provided for under the Ontario act of that year [1] and the federal act of 1894; Leon (1975) maintains that a separate court, with active participation by Ontario children's aid societies, was functioning in Toronto as early as 1892.[1] In any case, it lacked the character of a true separate court; it apparently sat in a City Hall room furnished only with a table and chairs.

---

[1] Ontario, Statutes, *An Act for the Prevention of Cruelty to and Better Protection of Children* (1893, 56 Vic. c. 45).

Nor could Toronto sustain the youth court movement. It was taken up again in the U.S., where Chicago in 1899, followed by Denver in 1900, established the first courts. Even though the first court for children had existed previously in Canada, it seems clear that the movement to set up such courts had its roots in the United States.

21

It was not until 1908 that the principle of the court was enshrined in the juvenile delinquents act. According to most writers, the concept as well as the name of this court came from the United States. The U.S. model was not reproduced without alteration in Canada; we developed a different kind of court, with procedures that were similar to those of our criminal courts, but adapted to the needs of the young.

The basic idea behind the creation of this court in 1908 was that justice had to be moulded to the individual needs of young people, and that once guilt was proven, the court must deliver them appropriate help and treatment, rather than punishment.

---

1. Stewart's information came from Col. G.T. Denison, Recollections of a Police Magistrate (Toronto, 1920), p. 103.

One of the fundamental concepts in the law, that of the state as guardian, could not apply here as it did in the U.S. In that country, the state could assume the parental role and intervene in problems of behaviour with criminal, social and family dimensions, for the American state had jurisdiction in civil as well as in criminal law. Owing to our division of powers under the constitution (see Appendix E), this was not possible. Civil law, with child welfare and protection, was a matter for the provinces, while criminal legislation was a federal responsibility; if the federal government desired jurisdiction over children, it could obtain it only through criminal law. The real state-guardians were the provincial governments, even though the federal government defined itself as such.

The court was made up, and still is, of three different types of judges: judges of the juvenile court appointed by the provincial government, magistrates who were also appointed by the provincial government, and federally-appointed county court judges. However, the presiding judges have so far nearly always been those of the juvenile court.

The juvenile court was not a public tribunal. Its non-punitive, protective and rehabilitative philosophy made it different from the adult court. This frequently criticized role flowed from the approach established by the act of 1908: special treatment for children, supervision, correction of vice, institutional settings, and probation. For these purposes, the law gave the court extremely broad discretionary powers, substantial flexibility on procedure — non-formality — and increased jurisdiction. Hence, from the moment of its creation, the court found itself in the dilemma that continues today: how to carry out both the judicial and the social functions. How was it to be a court, affording children the traditional safeguards and protecting society, while at the same time supplying the help, care and supervision of a good parent?

There were objections at the outset that the court was unconstitutional. These were soon refuted by the argument that the federal Parliament was not creating a new court, but merely deciding which of the existing courts was to rule on criminal cases, and regulating their procedures. Objection came also from Ontario, which was concerned for its children's aid societies; the province had many such societies which had been working in the area of child protection well before 1908, and even assuming responsibility for children who had committed offences against municipal and provincial laws. The Ontario objection seemed inconsistent, since the founders of the children's aid societies had lobbied for the 1908 legislation and the new concepts it embodied, and indeed their pressure was responsible for the passage of the act.

Toronto's deputy police chief was violently critical, 24 opposing the spirit of the new law and the paternalistic role assigned to juvenile court judges. When it first began operating, apparently, the court behaved more like a social-service clinic than a court of law, and this drew a certain negative response. It will be seen how, with time, the court's role was challenged and redefined.

The first juvenile courts were not set up simultaneously with the passage of the juvenile delinquents act. This evidently occurred in 1909, in Winnipeg. The first such court in Quebec would appear to have opened in Montreal in 1910, since the legislation providing for its establishment is from that year. [1] One would have to know, however, whether the court actually began sitting in the year the law was passed.

The 1908 act stated that the court could be established in any part of the country, as soon as satisfactory arrangements had been made with municipalities for setting up and maintaining it, as well as for detention homes and all other facilities required under the act.

Growth of these courts did not occur evenly across the country. It was concentrated in the large centres, a tendency 25 that has persisted to the present day. In 1913, only eight cities had juvenile courts. Sutherland (1976) has reported the following distribution for 1922: two in Nova Scotia, one in Prince Edward Island, one in Quebec, 13 in Ontario, two in Manitoba, and three or four in British Columbia. Saskatchewan and Alberta had passed laws to give the court province-wide jurisdiction. The Archambault Commission's figures were lower: according to its 1938 report, in 1935 only 18 cities possessed juvenile court facilities, and these cities accounted for only 52 per cent of Canada's population. This left the rest of Canadians without the juvenile delinquents act.

---

[1] Quebec, Statutes, 1910, 1 Geo. V c. 26.

To form a precise picture of the way these courts have developed it would be necessary to consult the relevant provincial statutes, for according to the provisions of the B.N.A. Act, it was these statutes that created them.

Material jurisdiction of the court: delinquency

Since the court was not created until 1908, it is only beginning with that year that we may refer to its jurisdiction. Its material jurisdiction, then, has been the area of delinquency. This had been defined before 1908 in terms of theft or larceny. In 1908, the definition of delinquency led into the constitutional issue: what offences should be placed 26 within the competence of the court, and which should come under provincial jurisdiction, thus avoiding the criminal category. In the end, a delinquency was defined under the act as a violation by a child (under 16) of any provision of the Criminal Code, a provincial or federal statute, or a municipal by-law or ordinance, punishable by a fine or imprisonment.

The court was given exclusive jurisdiction in all such offences so that its assistance could be available to any child in need of it. In the Senate debate of 1907, Senator Béique stressed the connection between increased criminality and the long list of crimes in the Criminal Code. We need take only one further step to distinguish a similar connection between the later rise in the delinquent population and this new definition of a delinquency.

The broad definition suited the thinking of the era, filled with philanthropic intentions towards young offenders. It was thinking that called for a preventive and not a punitive law, one that would start at the earliest age to root out the delinquent juvenile's anti-social attitudes. As Senator Scott argued in the same debate: [1]

> The Bill ... is for the betterment of a large class of the community, the children who are surrounded by an environment that leads to evil.... The principle of the Bill ... reads as follows:
>
> Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community

---

[1] Canada, Senate, Debates, 1906-07, p. 861.

> demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts; —

To achieve this, it was important to stress the child's overall behaviour rather than the offence. Yet to help the child it was also necessary to maximize the jurisdiction of the court, and hence to focus on the offences in order to encompass as great a number of these as possible. It was in this spirit that violations of municipal ordinances were included among the offences that could turn a child into a juvenile delinquent.

In 1924, the court's jurisdiction was further extended to include (s. 1) the offences of sexual immorality or any similar form of vice. This move reflected pressure from juvenile court judges and children's aid services; the judges wanted wider powers. According to the justice minister, the change was made in the child's own interest, and should allow for the more effective application of the law by increasing the role of the court. More discretionary power for the court would facilitate its duties of reform and correction of vice, by making it easier to place children under its supervision. According to Senator Lapointe: [1]

---

[1] Canada, Senate, *Debates*, 1924, p. 3509.

> ... this amendment has been suggested by associations for the protection of children. ... The whole spirit of the act is to protect children, and to give the magistrates who are appointed for the purpose of presiding over these juvenile courts more latitude and larger discretion .... It has been considered, in the experience of those judges who are spending their time in that social work, that the clause as it stands on the statute is not sufficiently broad to give them the latitude which they require.

The 1924 amendment was criticized as over-general and vague. According to its opponents, the absence of a definition for either sexual immorality or vice would mean varying interpretations from various judges.

In 1965, the law's definition of delinquency drew the fire of the MacLeod Committee. It pointed out in its report that a definition encompassing all possible forms of misconduct made it impossible to distinguish between a juvenile who was guilty of a mere slip in behaviour, such as truancy, from one who had committed such more serious offences as theft or violence. Conducts that were not forbidden to adults were forbidden to children, and classed as offences. Delinquency was thus defined more in terms of anti-social tendencies than specific violations of the law.

One of the committee's suggestions for rectifying this situation was to be specific in defining the offences a child could be charged with. It also suggested making a distinction between serious offences, such as violations of the Criminal Code and certain federal and provincial statutes as designated by the Governor in Council, and minor — that is, all other — offences. The committee was also of the opinion that the line had to be drawn between children and young persons.

9: The MacLeod Committee tended to minimize the minor offences, not with the purpose of reducing the powers of the court, but to set limits on the definition of delinquency.

The provinces took the lead given by the committee, and came to the 1968 federal-provincial conference calling for the abolition of the over-general offence of delinquency and its replacement by a charge relating to a specific offence. They proposed removing violations of provincial law from the juvenile delinquents act. In Newfoundland, where the federal act was not and still is not in force, juvenile delinquency was dealt with under a provincial statute and not the criminal law; violations of other provincial laws were prosecuted under provisions of those laws.

The provinces objected to the distinction between serious and minor offences made in the 1967 draft legislation on children and young persons as unnecessary; the judge had enough discretion in his rulings to take care of this. The provinces did, however, support the division by age of children from young persons.

91 In 1971, Bill C-192 brought clearer restrictions on the court's jurisdiction by limiting it to violations of the Criminal Code, and thus excluding offences against provincial laws and municipal ordinances, as well as sexual immorality or any similar form of vice. The bill also provided for a judicial selection process that allowed certain matters to be disposed of without a court appearance. This new provision reduced the powers of the court.

A fundamental principle of the bill was the equality of children and adults, and respect for the rights of children. Acts that did not constitute offences where adults were concerned ought not to do so for children either. Children must be protected from too much state involvement in their lives. And for all these reasons, the general offence of delinquency must be abolished in favour of specific offences. The therapeutic role which had so far fallen to the court had shown itself to be harmful to the children, and whatever results it had achieved in no way made up for the abuses it had bred. This role had to be challenged; the court must be defined in a new and above all a judicial role.

Previous periods had always recognized a social role
for the juvenile court. Now, the sixties and seventies
92 brought an about-face, with the emphasis on the court's
legal role. The new trend was clearly towards a gradual
separation of these two roles and a narrower jurisdiction
for the court. The objective was to define in more precise
terms the offences that came under the juvenile delinquents
act; there was also a desire to shed certain offences,
matters then to be dealt with under provincial laws for the
protection of children and young persons.

93 Personal jurisdiction of the court: the juvenile delinquent and adults

The juvenile delinquent

Although the 1857 act set the upper limit for juvenile offenders at age 16, age was not an important factor in establishing criminal responsibility. The sole criterion for criminal responsibility was whether the child could tell good from bad. Once it was established that he could, responsibility could be proven; and if he was proven guilty of the offence charged, he was sentenced accordingly. A child who was unable to distinguish between good and bad had to be acquitted, and no one asked whether he needed protection or special care.

Age became important only with the legislation of 1908. There was a desire at that time to set different upper age limits for boys and girls. The reason advanced for this was that a girl, even if she were older, was more vulnerable morally and hence required greater protection. Thus, Senator Power in the 1908 debate:

> The moral balance of a young girl is much more delicate than that of a young boy, and I think the young girl has much more need of being protected than a young boy.

94

The principle seemed to be borne out by the fact that other countries with laws for the protection of adolescents made an age distinction of a year or two in favour of the girls. Despite all these arguments, however, the law of Canada set the maximum age at 16 for both sexes, first because there was no such distinction on the basis of sex in the other federal statutes, and also out of fear that lack of uniformity could foster confusion. Here, the 1908 act followed imperial or English law and the Ontario statutes in fixing a uniform maximum age. The 1908 act also stipulated that no case could be transferred to the ordinary court unless it involved a criminal act and the juvenile was 14 or over.

Since the beginning of the twentieth century, there had been increasing public acceptance of the principle that children must be dealt with differently from adults in the administration of justice. In spite of the fact that the incapacity of children above age 7 was recognized in the civil courts, the juvenile court found them criminally responsible, even if they were so to a lesser degree than adults were.

In 1921, the age limit for delinquency was raised from
95 16 to 18 in provinces where the Governor in Council so proclaimed.
The new provision encountered opposition in Parliament, where there were calls for its withdrawal on the grounds that provincial institutions were unprepared for this new class of delinquents. It was also thought that their arrival in those institutions would incite the criminal tendencies of the younger children already there.

This gesture of raising the age of delinquency seemed to express a felt need to help and protect the child for as long a time as possible, keeping him out of the adult justice system and within the rehabilitating influence of the institutions that had been developed specially for him.

In 1922, British Columbia proclaimed 18 as the age of delinquency, followed by Manitoba in 1925, Alberta in 1935, and Quebec in 1942. In 1929, the law was amended so that the proclamation could apply to either or both sexes.

Reporting in 1938, the Archambault Commission came
down in favour of a maximum age of 16, leaving it to the
96 court's discretion to use its powers under the juvenile
delinquents act in dealing with young persons aged 16 to

18, if this was felt to be to their advantage. The commission also pointed out that problems in a number of reform schools had increased with the raising of the age limit, and that they had met with little success in treating the older delinquents as compared with the younger ones.

In 1951, section 2 of the juvenile delinquents act was amended by the addition of a new subsection under which the Governor in Council could, by issuing a new proclamation, lower the maximum age again to 16. The amendment was introduced in response to a request from Alberta. That province wanted to lower its maximum age back down to 16, and since it was not known whether the act permitted this, the law was clarified.

In 1965, the MacLeod Committee recommended making the minimum age 10, or possibly 11 or 12, based on evidence that this was the age when serious offences began to occur in sufficient numbers to require a criminal-type mode of prosecution, and also when the negative aspects of the system should have the least effect on the juvenile. This problem of deciding the minimum age had much more to do with the problem of assessing the effectiveness of the criminal law in relation to other means of social regulation than it did with the question of psychological evaluation, establishing the ability of children at various ages to tell good from bad, and guide their conduct accordingly. Other means of regulation were available: provincial child welfare and protection agencies could, given adequate facilities and trained staff, control anti-social conduct among juveniles. It would be unreasonable, however, to consider raising the minimum age unless the provinces could meet the costs of their enlarged responsibilities.

The committee recommended a maximum age of 17, even though a number of deputations appearing before it had called for 18. For the committee, the choice of 17 would have the advantage of getting the 16-year-olds out of the penitentiary system, while necessitating fewer changes and administrative adjustments across the country.

92 The importance of age was recognized in the 1967 draft legislation on children and young persons, in which penalties for children aged 10 to 14 were less severe than they were for adolescents aged 14 to 17, and transfer to the ordinary court was ruled out for the junior group.

At the 1968 federal-provincial conference, the majority of provinces declared for a minimum age of 12 and a maximum of 17, to apply throughout Canada. Provincial arguments revealed two concerns: the protection of the children, and the least possible impact of any change on the supply of institutional treatment facilities. It was apparent in discussion that the more important aspect for provincial representatives was the actual organizing and operation of resources and institutional facilities, as well as their cost.

The new decade of the seventies witnessed an upsurge of interest in the child, with discussion centring around maturity and child development — psychological and emotional, intellectual, physical, and social. Most groups submitting briefs to the standing justice committee while Bill C-192 was under study called for an upper age limit of 17 or 18. They argued that the limit must be set as high as possible because the age of adolescence was being drawn out; young people were now studying longer and entering the work force later, and this affected their maturity. For this reason, they needed longer protection. Another suggestion was to exclude adolescents who were married from the jurisdiction of the court; it was suggested that before any decision was made about whether or not to hand them over to the local youth services, there should be consultation between the court and the services to consider such factors as maturity and the seriousness of the offences.

The current upper age limits in the provinces are as follows: age 16, Prince Edward Island, Nova Scotia, New Brunswick, Ontario, Saskatchewan, Yukon and N.W.T., and (for boys) Alberta; age 18, Newfoundland and, since January of 1972, British Columbia; age 18, Quebec, Manitoba, and (for girls), Alberta.

100 The settling of these maximum ages is not so simple a matter as might at first glance appear. The cases advanced by provinces and the various service groups express ideal situations which, for want of financial resources, must so remain. Federal and provincial governments have to deal with the reality. If it is not easy to change public attitudes, it is no easier to implement programs for doing so. Thus is delinquency in theory managed, but in reality unchanged.

Adults

The protection of children against abuse from adults has been a perennial concern of the lawmaker. The offence of carnal intercourse with a girl under the age of 14 was introduced with the 1892 Criminal Code (s. 269). After 1869, it was an offence to contribute, directly or indirectly, to a delinquent's escape from reformatory. These provisions (32-33 Vic. c. 34) applied, through not exclusively, to adults. However, their
101 application was limited to Quebec, and since there was no juvenile court at that time, offenders appeared before the ordinary court.

It was not until the great changes of the 1908 act that the idea of contributing to delinquency came into the light. Canadian lawmakers modelled their provisions on the State of Colorado, which in 1903 had made this an offence under its juvenile court legislation. Under section 29 of our 1908

act, any adult who aided, encouraged or abetted a child in the commission of an offence, or who did any act contributing to a child's being or becoming a juvenile delinquent, was guilty of a summary offence punishable by a fine, or imprisonment, or both. Unless (s. 18) the court was satisfied that the child's parent or guardian had not, by negligence or otherwise, contributed to the delinquency, the parent or guardian could be ordered to pay any fine, damages or costs imposed in the case. Judging from the parliamentary debate accompanying its passage, the aim of this section was to force parents to shoulder their responsibilities, and to encourage and strengthen their natural feelings for their child. It was hoped that the threat of criminal punishment
122 would wring co-operation and even affection from the child's parents. This jurisdiction was not assigned exclusively to the juvenile court: under section 29 (1) of the 1908 act, such prosecutions could be brought in the juvenile court, but they did not have to be.

In 1921 (s. 3), this provision was altered by the addition of the phrase underlined:

textual

> Any person who knowingly or wilfully encourages, aids, causes, abets or connives at the commission by a child of a delinquency, or who knowingly or wilfully does any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent, or likely to make a child a juvenile delinquent, whether or not such person

> is the parent or guardian of the child, or who, being the parent or guardian of the child and being able to do so, wilfully neglects to do that which would directly tend to prevent a child's being or becoming a juvenile delinquent, or to remove the conditions which render a child a juvenile delinquent, shall be liable on summary conviction before a Juvenile Court or a justice, to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years, or to both fine and imprisonment.

103 Further amendment in 1924 (s. 4) produced the underlined additions in the middle part of the section:

[illegible]

> ... or who, being the parent or guardian of the child and being able to do so, knowingly neglects to do that which would directly tend to prevent a child's being or becoming a juvenile delinquent or to remove the conditions which render or are likely to render a child a juvenile delinquent ...

The intent of the 1921 amendment was to see the adults punished even if the child had not turned into a delinquent. The 1924 addition of the phrase "or are likely to render ..." made it easier for the court to convict in these cases: the mere existence of the conditions claimed in the indictment was enough to make the accused liable to the penalty, unless there was proof that he or she was not responsible for these conditions.

In addition, the word "wilfully" used to describe the neglect was replaced by "knowingly": this was done to force persons charged with having acted in such a way as to turn children into delinquents to produce reasons why they should be exonerated.

The purpose of the 1924 amendment was to make the 1921 one clearer and more effective. It was prompted by some western court decisions that made the 1921 provision ineffective.[1]

Further changes were made in 1932 (s. 1), and 1935 (s. 3) with the addition of a subsection stipulating that there was no valid defence in the facts that the child had not become a delinquent despite the conduct of the accused, or that the child was too young to understand or appreciate the nature or the effect of the accused's conduct. It is to be noted that in the 1929 act, the words "or are likely to render" had been removed; the new subsection was probably devised in response to difficulties similar to those raised in 1921.

In 1965, in the face of the many briefs that had called for increased responsibility on the part of the parents or guardians of delinquent juveniles, the MacLeod Committee recommended that this responsibility be substantially limited, and that punitive sanctions as in section 22 be employed only when it became obvious that the parents had not given their co-operation to the court. Another committee recommendation

---

[1] See Canada, House of Commons, Debates, June 23, 1924.

105 was the abolition of the offence of contributing to delinquency, made on the grounds that this provision was prejudicial to adult defendants in several ways. First, the law's failure to define negligence or stipulate what conduct was admissible and inadmissible left it open to a variety of court interpretations. Secondly, the defendant was deprived of trial by jury or in a higher court. Finally, the committee added, the section was most frequently used because it was easier to secure the conviction of an adult in a juvenile court, and in such cases the juvenile court tended to hand down heavier sentences. The committee suggested that adults could be charged instead under one or more sections of the Criminal Code.

The 1967 draft legislation on children and young persons also recommended abolishing this offence, and recognized the principle of a limited court jurisdiction over adults in cases where there were permanent family relations or else legal relations between accused adults and adolescent children. In 1971, Bill C-192 proposed that adults be transferred to the juvenile court only with the Attorney-General's permission, and even then, only in cases of certain specified offences under the Criminal Code.

106 Another suggestion advanced in the sixties was that the provision on contributing to delinquency be amended to

rule out the defence that an accused adult did not know that the child was of juvenile age. The suggestion was prompted by a decision of the supreme court that went against some earlier decisions of the lower courts, and held that a defendant could plead in this way.

Over the years a number of questions have been asked, and are still being asked. Is it just to lump together adults who actively urge children to delinquency and those whose poverty or ignorance is expressed in negligence leading to delinquency, and treat both groups as if they were the same? Is it a good thing to leave the definition of negligence to the judge's discretion? Of course it is impossible to specify the full list of preconditions for negligence, but could we not define a few basic criteria, set some limits? In leaving the court the power to define negligence, are we not leaving it the power to define an offence — a power that is properly that of Parliament? These are questions that call for answers in the coming legislation.

107 Extent of the court's jurisdiction

Under section 16 (3) of the 1908 legislation, the court's jurisdiction over delinquent juveniles extended to age 21. Up to that age, the court could order the return of the child at any time during the period of wardship and take further or other proceedings in the case, including freedom on parole and discharge from an institution. The court's discretion was complete. A single restriction seemed to apply under the act in cases of children being discharged from industrial schools; here, the court was obliged to obtain a report recommending the discharge from the superintendent of neglected and destitute children, in provinces where there were such officials. The provision was included at the insistence of Ontario, which already had a superintendent with these powers.

In 1913, the Senate passed an amendment to increase the juvenile court's jurisdiction.[1] Its purpose was to give the court jurisdiction over juveniles over age 14 who had been sentenced to detention or imprisonment in an industrial school and got out of reasonable control by the persons in authority. The juvenile was to be brought before the judge, who could then order his transfer to a place with stricter controls if the person in authority certified that this was desirable and the judge himself felt that there was sufficient cause to do so. In addition, if there was proof of insubordination and vicious conduct, the judge could sentence the juvenile to a further term of detention or imprisonment not exceeding two years. Although the Senate approved it, there is no trace of this amendment in the debates of the Commons or in the juvenile delinquents act.

---

1. Canada, Senate, Debates, March 5, 1913.

Evidently this trial amendment remained just that. It was prompted by the desire to resolve cases of incorrigibility and insubordination in these schools, and also, by transferring the culprits, prevent corruption of the other juveniles. The immediate motive was just such a case in one of our industrial schools.

The MacLeod Committee pointed out in 1965 that it had not been the lawmakers' intention that all delinquent juveniles under the age limit be exempted from proceedings in the ordinary courts; this was why there was a provision 109 for transfer. At the time the committee delivered its report, as is still the case, the court's jurisdiction over the juvenile delinquent extended to age 21. One of the committee's suggestions was that the juvenile court's jurisdiction extend for two years after discharge, and not after age 21.

In 1971, several of the deputants appearing before the standing justice committee complained that the court's jurisdiction was too large. A number of suggestions were made for limiting it by such measures as: identifying at the outset those juveniles who required prosecution because of their need for supervision and punishment, and those needing help only; raising the minimum age; and establishing a compulsory process of pre-sentence consultation.

The Participants

110 ### Lawyers

I am including Crown attorneys here as well as lawyers for the defence. To neither group, if we are to judge by the number of provisions given over to their work, does the law attach any great important. The spirit in which the law was originally conceived was in fact not overwhelmingly judicial. Before 1908, the statutes affecting juvenile offenders contained no provision relating to lawyers. The 1908 assigned the leading roles to the judge and the probation officer; the latter, with his duty to be present in the court to represent the child's interests in the hearing (s. 27), played the part of the defence lawyer. This obligation is still found in the present legislation (1970, s. 31):

> It is the duty of a probation officer ...
>
> (b) to be present in court in order to represent the interests of the child when the case is heard.

This role as the child's representative is a difficult one,
111 given the fact that section 32 of the same act places the
probation officer under the court's authority.

It is hard to know what role lawyers were supposed to play in relation to the court and the juvenile delinquent. The judge of the juvenile court was envisaged as a benevolent parent coming to the aid of the child in need of it. There was no place for lawyers in this picture.

In 1936, an M.P. rose in the Commons to suggest that the state provide defence lawyers for delinquent juveniles and all persons under age 19 appearing on a charge in a criminal court. The justice minister's reaction was that this would involve too many changes in the system, and would ultimately require making such a service available in all cases before the courts. Moreover, it would be necessary to consult the provinces before making the change; it would be up to them to pay the defence lawyers.

With the late sixties and the return to stricter formality, there was discussion of children's rights, including the right to legal representation. There was disagreement on the training a lawyer defending juveniles 112 ought to have. Should he have had special training that included a knowledge of child psychology and personality development? Did he even need legal training? Some argued that a legal education was not absolutely necessary, and even went so far as to say that the legalistic approach of lawyers was not always in the child's best interests.

No final criterion was agreed upon. Above all, defence representation for children depended on the availability of legal aid, and this varied from one part of the country to another.

The Crown's lawyers have an important role as well. They can decide on the seriousness of the charges to be made and they can also, in certain circumstances, decide to refer the case to a service agency instead of prosecuting. It was suggested in the 1967 draft legislation on children and young persons that Crown attorneys should be able, at any time before the plea for the defence was taken, to call for the case to be transferred to the ordinary court. The draft provision stipulated, however, that once it had ruled on the young person's guilt, the ordinary court must then return him to the juvenile court for sentencing. The proposal did not receive the support of the provinces.

In the U.S., the benchmark Gault judgment of 1967 [1] focussed attention on the importance of the role of a legal advisor for juveniles in seeing that the facts of a case were stated correctly before the court exercised its powers of sentencing or disposition. This court decision had the effect of increasing legela representation in youth courts.

In Canada, the 1971 Bill C-192 made it a requirement that the minor be advised of his right to retain a lawyer to represent him. In the absence of legal representation, the bill allowed the father, mother, or any other person whom the judge accepted as able to advise the juvenile charged, to act as his representative and conduct his defence. This representation formula met with opposition from the provinces and various service organizations.

How will the lawyer's role fare in future in the juvenile court? Given that the basic purpose and philosophy of the law are rooted in aid and co-operation, it is hard to envisage the lawyer, defending or prosecuting, as playing a role similar to what one finds in the ordinary court, that of adversary and infighter. This would be inconsistent with the goals even of the law as it now stands. 114 However, there is more and more talk about protecting and respecting the rights of children, and this spells a new role for the lawyers. The current court accent is more formal procedurally, more legalistic in tone: are we to understand from this that lawyers will be acting in the juvenile court in more or less the same way as they act in the ordinary court? What them would be the advantage of being brought before a special court, under a special law for minors?

Police

The police have always been called to play an important part in the delinquency process. The mere fact that they are among the first to make contact with the juvenile means that they have special power to dispose of his case unofficially, before there is any hearing and even before an information is laid with the Crown. The police can choose to arrest or not to arrest; their role in conducting inquiries to be brought before the court means that they can continue or else not continue a complaint, even if an offence has occurred. Their

115 regular contacts in the field give them special knowledge of the delinquent juvenile's environment.

The police have also a prosecution role. In 1965, the MacLeod Committee reported that it was current practice for the police to give the evidence against the child in court. The police are also responsible for gathering the evidence relating to the delinquency and for questioning the juvenile offender.

Despite the importance of the police role, however, the lawmakers have not seen fit to regulate their activities in the area of delinquency; the laws affecting juvenile delinquent contain no provision concerning the police. Nonetheless, the committees examining the question have always paid particular attention to the police role, and it will not be possible to discount it in future.

Under the system of justice for minors, the police role is significant but complex. Contrary to what is generally believed, the police do not go around sniffing out deviant behaviour, but are most often acting in response to complaints. It is these complainants who are the cause of police intervention.

116 The primary duty of the police is to enforce the law, but they are often asked to be social workers and probation officers as well. Obviously, they cannot play all these roles; they can, however, co-operate usefully in the process of diversion and rehabilitation.

117 Parents

As has already been indicated, the nineteenth century viewed the family as the leading resource for the rehabilitation of young people, or to put it more precisely, the most appropriate means for this purpose. However, this consideration did not prevent the emergence of institutions for minors. Gradually, these institutions came to take the family's place, just as the state took the place of parents.

The state announced its new role as parental surrogate in the 1908 legislation. It assumed the duty to act in cases of parental negligence or improper conduct. The 1908 act did not entirely negate the parents' role; they were held responsible for their children's delinquency and punished accordingly. This was the intent of sections 18 and 20 of the act. The first of these made parents liable to a fine or to costs or damages if the court decided that they had contributed, by negligence or otherwise, to the delinquency of their child. Section 20 created the offence of encouraging delinquency when parents had wilfully neglected to do that which would directly tend to prevent a child's becoming a juvenile delinquent, or to remove the conditions that rendered a child a juvenile delinquent.

118 Section 8 of the act set out the court's duty to

notify the child's parents when the delinquency charge was to be heard. The 1894 act had contained a provision for such notice of the information or complaint made against the child, but it applied in Ontario only, and was not binding on the court.

The new system of probation, the purpose of which was to avoid institutional detention of juveniles, focussed attention on upgrading the child's environment, with placement in natural or adoptive family settings.

It would take long investigation to discover what role the family actually played in this system, and assess how well the system worked from this standpoint. In any event, the state reserved the right to intervene at any time, revise the terms of probation, and reassume control of the child (1908, s. 16 (3)).

The provisions respecting parents have remained more or less the same since 1908, at least in the text of the statute. Changes have been promoted, however, by the various committees of inquiry. They have wanted to make it a parental obligation to be present at the hearing, and to support and even defend the best interests of the child. The MacLeod Committee pointed out in 1965 that parental attendance at hearings was poor, and that among the reasons for this was a cost in wages which the families could not

119

afford. The committee recommended making it compulsory for parents to appear unless one or the other of them was excused by the court, or in unusual circumstances. In 1971, Bill C-192 made the court appearance compulsory for parents; failure to appear could be interpreted as contempt of court. The provision was widely viewed as excessive.

There has been a growing desire to involve parents in the judicial process for minors. They are seen as bearing a degree of responsibility, but instead of punishing them, the justice system is attempting to make the best possible use of them. This does not indicate, however, that the state has completely abandoned the parental role it created for itself.

The court and the judge

Only since 1908 has there been a figure we can truly term a judge for juvenile delinquents. Previously, juveniles were brought before a justice on the same basis as adult offenders. In the law before 1908, there were only a few restrictions on the justice's powers in juvenile cases.

The 1908 act officially established a court for juvenile delinquents with a judge who was assigned a special role in implementing the new philosophy of help and assistance. This judge was more than simply the person who ruled on guilt and disposed of cases. He was a firm and benevolent parent, whose persuasive powers redeemed the child from vice.

He was characterized by Scott and Kelso, both writing in 1908, as a person of courage, perseverance, and understanding, who commanded the trust of children, knew how to dig into the problems of society, and possessed a background in the law. These stringent requirements were clearly 121 suggested by the example of one of the early pioneers in the juvenile court, Judge Lindsay of Denver, Colo., who apparently met all of them. It must not be fondly imagined, however, that the same was true of all juvenile court judges.

In his absence, the judge was replaced by the police magistrate. To correct this situation, there was a new provision in 1914 for the appointment of a deputy judge. Accustomed to dealing with criminals and meting out harsh justice, the police magistrates were not suited to this jurisdiction. This tells us something about the importance that was attached to the qualities of judges presiding in the juvenile courts.

From the very outset, given the new court's helping and reforming role, the lawmakers gave the judge broad discretionary powers. The inclusive definition of delinquency made it possible for him to act in a wide variety of cases. The powers were justified by his duty to watch over the best interests of the child. In 1924, they became greater still with the addition of the offence of sexual immorality, which was open

to the interpretation of the court: any minor occurrence, for example the smoking of a cigarette, could be treated as a delinquency. In the Commons debate, the justice
122 minister responded to objections that this new provision gave excessive powers to the court by stating that the juvenile court judges were in touch with what was going on in their jurisdiction, had the added benefit of the probation service's assistance, and took due note of the peculiarities of each case that came before them. The minister emphasized how impossible it was for lawmakers to define all the conditions that produced negligence; thus, the definition of negligence and the decision as to its seriousness had to be left to the court.

Reporting in 1938, the Archambault Commission again stressed the special role assigned to the juvenile court judge: his duty was to help and understand, and not to punish. From this standpoint, incarceration must be his disposition of last resort.

In the years following, there were various challenges to the court's powers of decision. One suggestion was that the judge be replaced at the time of final disposition by a mixed committee of psychiatrists, psychologists and social workers.

In 1965, the MacLeod Committee rejected these proposals, recommending that the judge's powers of investigation and

123 decision be upheld. The recommendation was prompted by the consideration that the purpose of passing sentence was not simply to rehabilitate the child, but to protect society in general. With the delinquent's freedom at stake, the course of wisdom was to leave the decision to the judiciary. In the committee's opinion, it was not essential for the judge to be trained in psychology or the social sciences; it was essential, however, that he be trained in the law. In addition, because of the broad discretionary powers given to the court, the committee came out strongly against any leniency in matters of incompetence; the judge's mistakes were paid for by the juveniles themselves.

The 1967 draft legislation on children and young offenders contained the suggestion that the judge should lose his exclusive power respecting transfer to the ordinary courts. Transfer could be requested by either the accused or, for the prosecution, the Attorney-General. The juvenile court's jurisdiction would then be removed for trial only. Once the child was found guilty by the ordinary court, he would be referred for sentencing to the juvenile court. At the same time, the juvenile court would retrain a discretionary power of transfer similar to that existing under the 1908 act.
124 In thus deciding to waive its jurisdiction, the court could order transfer for trial only, retaining the power to sentence,

or it could order transfer for both trial and sentencing — a complete waiver.

The draft legislation also provided that the court should take informations and issue warrants and summonses, which meant in effect that the court would be deciding who was to be subject to criminal prosecution and who should be, for instance, handed over to a probation officer responsible for negotiating an agreement between the parties involved. There was objection to this proposal on the grounds that these powers should rest with an independent officer; it was dangerous to make the court over into a social agency.

Despite these proposals, the subsequent Bill C-192 (1971) hoed the traditionalist line and upheld the judge's supremacy. The philosophy of the bill was different, however, and this affected the judge's future role. He was to have a dual function, judicial and social, and thus the conflicting aims of protecting society and protecting the child. It was suggested by some agencies that the ruling on guilt be made 105 separate from the disposition, the former being left to the judge and the latter carried out by a mixed committee which would be in a better position to assess the child's needs and circumstances, and possible treatments.

The judge's professional background [1] also came under discussion. If he were to rule only on guilt, legal training was enough; otherwise, he needed a background in the social sciences, for he would be called upon not only to impose sentences, but also to be responsible for the effectiveness of treatment.

---

[1] Except in Quebec, New Brunswick, and Nova Scotia, where he or she must be a lawyer, there is no formal job requirement for juvenile court judges in Canada.

The debate continues; there has been no change in the law itself, but practice has been modified over the years, and the training and role of the juvenile court judge vary from place to place. Standardization is yet to come.

How will the juvenile court evolve? Can it stick to its philosophy of help and benevolence and still enforce the rights of children? The dilemma is ever more acute, as there is ever greater pressure for a justice for children that is equal to that for adults.

136

Social agencies

The main bodies associated with the court are the probation services and the juvenile court committees.

Probation services

Until 1908, except in Ontario where there was a probation service that was acknowledged in the 1894 act, the only alternatives available to the justice or magistrate dealing with a juvenile offender were the detention home and the jail. In 1894, the new choices available in Ontario included detention in an industrial school, probation, and a suspended sentence. With 1908, the choice of probation became general. This enhanced the potential for rehabilitation by placing the juvenile, not in a prison or other institution where he might become corrupted, but in his natural or adoptive family under the watchful eye of a probation officer.

126

These probation officers were in existence for some time before the 1908 legislation made reference to them. According to Scott (1908), the first two paid officers began work in Ottawa on August 1, 1906. They were both women, chosen for two reasons: first, women were believed to have natural maternal instincts that lent themselves to this type of work, and secondly, the available pay attracted a better class of women than men. Before starting, the pair spent two weeks training in Philadelphia so that they had an idea of their role and the nature of the work. In their first year on the job, of 240 juvenile delinquents in Ottawa only three were placed in institutions. Montreal hired its first probation officers on January 1, 1908.

Much importance was attached to probation officers in the act of 1908: they were crucial to the system, and reformatories were pushed back into second place. The probation officer was to be involved at the stage of the preliminary investigation, for in some cases he could forestall a court appearance. When it came to the hearing, it was the probation officer who contacted the juvenile, took care of him, and looked into the facts of the case. After the hearing, he or she was frequently ordered to see that the sentence was carried out by keeping the juvenile under supervision and giving him all possible assistance. The law protected him from any civil action when he had carried out his functions in good faith. These 1908 provisions did not win universal approval; there were claims that the powers given to probation officers left the young offenders at their mercy, unprotected against potential abuse of these powers.

In 1938, the Archambault Commission noted that in the country's largest centres and best-run courts, probation officers were working with psychiatrists and studying the child's mental and physical condition, his social background, and all factors that could have contributed to his delinquency. The officers were reporting to the court and helping to select the treatment.

The commission emphasized that the mistakes made in hiring officers to supervise juveniles in the penitentiary system must not be repeated with probation officers. The penitentiary officers were poorly educated, often given to coarse language, and displayed no interest in the young persons placed under their supervision other than preventing them from escaping and ensuring that they carried out certain manual tasks. Attention must therefore be given to the training of probation officers.

129 The Archambault report stressed the importance of proper qualification and specialized training. It also raised the question of the probation service's independence of, or dependence on, the court. Without attempting an answer, it argued that the existence of such a system was absolutely essential; its own inquiry had revealed that probation was most successful with first offenders, but continued to be of more than probable effectiveness in other cases as well.

The provisions advanced in the 1966 draft legislation approximated those of 1908. The probation officer was assigned the added duty of giving the court a pre-sentence report on the personal, family and environmental background of the delinquent. This report was not a requirement in every case, but mainly when the child or young person was to be placed, for example, with a children's aid society, or a reception centre, or a training school. The pre-sentence report had not existed in the 1908 act.

The probation officer did not win his independence with the 1971 Bill C-192; he was to remain under the authority of the court, and carry out the same duties: pre-sentence report, investigation, probation ...

130 The juvenile court committee

The 1908 legislation also brought into being the juvenile court committee for the delinquent's defence. This committee, whose members were unpaid, had no decision-making power; it was a consultative body, and worked through the probation officer to suggest to the court how a juvenile might be dealt with. Its members were the members of the children's aid society; where no such society existed, the court made three appointments to make up the committee.

Judging from the debates, the purpose envisaged for this committee seems to have been to see to the welfare of the child, take care of him, and spare him incarceration. The idea had sprung up in the United States, where the first experimental committee had met with success. In Canada, a committee of this type was formed at Ottawa in 1906. Its initiators may not have seen it as essential, but they believed that it was useful. It functioned for several years, and its services won the appreciation of the Ottawa children's court. The idea did not spread, however, and the Ottawa committee was disbanded, a setback that seems to have been the result of
? disagreement between the judge and the committee. In 1911,
131 an amendment respecting children's aid societies was introduced in the Senate. It stipulated that no child whose religion was other than Roman Catholic or Protestant should be placed with a Catholic or Protestant children's aid society. This

amendment [1] was prompted by pressure from the Montreal Jewish community, then more than forty thousand strong, to have Jewish children running afoul of the law placed in the control of the court, and the juvenile court committee in such cases made up of Jewish people. One senator objected on the grounds that this could cause great difficulty in western Canadian cities where there were forty or fifty different religious groups. The amendment passed the Commons notwithstanding in 1912.

There were more amendments in 1929. Now, when a juvenile court committee could not be formed for want of a children's aid society, not only did the court have the power to appoint such a committee but it was also obliged to do so
133. on receipt of a request signed by more than fifty persons in the municipality. In addition, the law now allowed certain members to represent the committee, and be present at any session of the juvenile court.

The 1965 MacLeod Committee report acknowledged the importance of the role that juvenile court committees had played. They had functioned as a liaison between the court and society. As messengers for the court's philosophy and goals, they should stimulate the popular support required for the court to achieve its objectives. They were also frequently responsible for re-education, and sometimes acted as volunteer probation officers.

The report proceeded to recommend a change in the committee's role. It was to be extended from simply assisting the court to include offering assurance to the public that the court was working satisfactorily. Given this role, there could be no question of the committees' remaining optional, to be created at the pleasure of the court. The MacLeod Committee wanted them set up right across the country.

In the 1970 act currently in force the provisions 12c respecting the juvenile court committee and its duties are unchanged. It is not practical for me to try to determine the present numbers of such committees or the importance of their role. However it becomes clear, following the remarks made by provincial representatives at the 1968 conference, that these committees should not only continue to exist, but that they should be compulsory, and that it should be a responsibility of provinces to put them in place and define what their duties are. And the role of these committees is changing: most provinces now see them, not as defenders or even as aids to the court, but as guardians set to watch over the due administration of the court and its services.

Procedure

134

I want to deal now with procedure. The juvenile delinquents act is a law of exception in the application of criminal law, and the procedure used in the juvenile court differs from that used in the ordinary courts. Several of the sections of the juvenile delinquents act have to do with procedure. Before going into detail on these, however, I will consider the issue of the rights of the child and due process of law.

Rights of the child and due process of law

The accepted rights of adults and children in criminal cases are widely different. The preliminary hearing, jury trial, and absolute right of appeal, to mention only these three, exist only for adults. It is often noted as well that the rules governing arrest, examination, and fingerprinting by the police are not followed when it comes to minors. In this, practice is supported by a philosophy that has been with us for a long time. Even before the creation of the juvenile court and the special provisions of the 1908 act, reformers had opposed children being dealt with in the same way as
135 adults, subject to the same laws and the same procedures, and to the same sentences in the same places of incarceration. Beginning in 1857 in Canada, there were efforts to improve

the juvenile delinquent's situation: summary trial to speed up the court process, and bail to allow juveniles awaiting trial their freedom. The 1894 act set its stamp on the principle of keeping juveniles separate during their detention and trial from criminals and older offenders.

Gradually, society defined a new role for itself, and assumed new duties. The juvenile delinquent became the object of attention, care and concern on the part of the state. And all this thinking was reflected in the 1908 legislation. Young persons were no longer to be dealt with in terms of the concept of justice, as either guilty or not guilty, but according to their special status as minors and their condition of delinquency. The notion of crime and punishment were banished as far as they were concerned. It was unthinkable in their cases to apply the usual severe, technical criminal procedure. Hence the ideas emerged of 13a establishing a special court whose duty it would be to act as a good parent to the delinquent juvenile, of creating an offence of delinquency, and a contrary sort of procedure. The state took the place of the parents and assumed the right to dispose of the child as it saw fit. In so doing, it did not deprive the child of any right, for children had no accepted right against parents, while parents had all the rights over their children.

Over time, questions began surfacing about the rights of children: did these exist, and if so, what were they? In Canada, this has been a fairly recent development. In 1924, for example, it was asked what effect a new amendment to the juvenile delinquents act would have on the rights of children. The amendment in question created a new offence of sexual immorality or any similar form of vice. The objections boiled down to this: would not the amendment allow the court to have jurisdiction over the child in circumstances that the parents would see as being perfectly harmless, and was this not therefore trifling with the child's right of freedom?

124

The 1929 act met similar objections in introducing a provision under which no ruling or act of the juvenile court could be annulled or set aside because of any flaw or irregularity as long as the outcome of the case had been in the best interests of the child.

In 1938, the Archambault Commission called for greater respect for children's rights. It recommended that no person be found guilty of an offence without first having been formally charged; that no guilty plea be accepted unless the presiding judge was satisfied that the child understood the nature and quality of the charge made against him; and to a defendant's right to legal representation if he wanted it.

The 1967 Gault decision in the U.S. had a key effect in giving impetus to the issue. The decision strongly challenged the soundness of the legal protections given young persons appearing in the juvenile court. It turned around the paternalistic, arbitrary approach that typified U.S. juvenile court practice, and ensured the same protection of due process for young persons as for adults.

The decision had its influence in Canada. From that time on, the trend was to make sure that juveniles enjoyed the full protection afforded them by the law, and especially that hearings be held in camera. This concern was expressed in Bill C-192 (1971). The purpose of the bill in setting forth an unambiguous and clearly defined procedural framework was to give young persons access to all the procedures of the ordinary courts, so that they could prove, if such were the case, that they were not guilty as charged. The bill drew on the Criminal Code for several provisions to protect individual rights. The court would have to conform to a host of formalities concerning such matters as notification of parents, previous requests for reports, and specific, reasoned rulings.

However all these new provisions fell by the wayside. The bill met with vocal and substantial opposition, the main charge being that it was in reality a criminal code for children. It was dropped. The prevailing philosophy, which held that the juvenile delinquent must be dealt with differently from the adult, was not easily dislodged. In the name of this philosophy the child continued, in theory at least, to be disqualified from a more legal procedure with some protection for his rights and some respect for due process of law. In terms of court practice, however, there seems to have been some change: there are more defence lawyers, and procedure is somewhat more formal.

139 Although the bill was dropped, a new philosophy emerged, according to which the criteria for intervening in a juvenile's life were the same as for intervening in the life of an adult: if the judicial process has to move, it must do so with the least possible encroachment on the individual's personal life, and the least possible interference with his freedoms.

* * * *

140 It is no easy task to detail how juvenile court procedure has evolved through the years. Beyond the texts of the law themselves, the literature tells us little. As I have already indicated, the juvenile court is one in which legal formalities have been minimized in favour of a philosophy of help and assistance. It will be readily understood, then, that the relative unimportance attached to matters of procedure has meant a dearth of comment in that area. In

fact, talk of greater procedural strictness is a quite recent phenomenon.

I will examine juvenile court procedure in terms of three main stages in the process: pre-hearing, hearing, and disposition. The pre-hearing stage extends from the complaint to the hearing and includes the following phases: the information or complaint of a delinquency, arrest with or without warrant or else the simple summons or promise to be present, the examination, fingerprinting, laying of the charge, bail, and notification. Since they are temporary measures, bail and the promise to be present will be examined under the rubric of dispositions.

The hearing includes the court appearance, the guilty plea, the trial (if there is one), and the ruling on guilt. The last stage to be examined is that of the final disposition.

141 Pre-hearing

According to the 1857 act, an information against a juvenile under age 16 on an offence of larceny or an equivalent offence could be brought before a justice of the peace on the oath of a credible witness. It was then up to the justice to issue a summons to appear or an arrest warrant. The juvenile made an appearance before one or more justices of the peace, who could detain him to await further examination or else free him on bail, each surety being taken for the further appearance of the accused person or persons before the justice or justices. These provisions remained substantially the same until 1908. The 1894 act provided that a juvenile delinquent under age 16, arrested with a warrant, must be held separately from older prisoners. In 1908, this provision was extended to include those arrested without a warrant, and the act went on to stipulate that they must be held in detention homes reserved for the exclusive use of children. It is important to mention that the detention referred to in each case was temporary: the juvenile was awaiting trial or sentencing.

The 1908 act announced that prosecutions and trials under the act were summary and subject, mutatis mutandis, to the provisions of Part XV [1] of the Criminal Code; it also stated, however, that procedure in the trials of children could, at the discretion of the court, be made as informal as the circumstances allowed. A new provision in the 1908 act was the verbal or written promise: when the person notified of the charge accepted responsibility for the child's presence in court as required, the child could then be freed. The purpose of this was to avoid holding children in places

142

---

[1] Part XV of the Criminal Code at that time was probably the equivalent of the present Part 14: Summary Convictions.

other than places reserved for their use, when such places were not available for their temporary detention.

In its 1965 report, the MacLeod Committee took note of the effects of judicial discretion and lack of uniformity that separated the law's goals from its application, and made several recommendations concerning the police. Police must use detention only in emergencies; they must never take punitive measures; and when a juvenile was being questioned by police, an adult willing to defend his rights had to be present.

The committee also recommended that informal arrangements be acknowledged in the law. The 1966 draft legislation on children and young persons included the informal arrangement among its provisions. In cases where the court was convinced that the complainant's charges were well founded, it could order a meeting with the probation officer assigned to the suspected child or young person, and his parents or guardians or other interested parties, to examine whether it was advisable to proceed with the information or whether the matter could be settled without it. There were to be two preconditions for such an arrangement: admission by the child or young person of the essence of the complaint, and the written consent of the parents. An element of judicial control was provided for, in that a written report detailing the conditions of the arrangement had to be lodged with the court.

The draft legislation also contained the proposal that justice of the peace or magistrates be asked to deal with traffic offences, not for the purposes of diversion as such, but simply to take the load from the juvenile court.

14.1

There was agreement from several provinces on the form of arrangement proposed in the draft legislation. Some provinces even thought that the probation officer should be involved before any action occurred in the court; in certain cases, he or she would be responsible for resolving differences and negotiating arrangements before any information or complaint was brought to the attention of the court.

In the act of 1970 currently in force, the provisions outlined above have been maintained. I shall briefly repeat what these are. The Criminal Code provisions apply, mutatis mutandis. The prosecutor is defined by the Criminal Code as the complainant or the Attorney-General or their legal representatives. Except in cases of arrest without a warrant, the defendant is brought before the juvenile court by warrant or summons. The sections of the Criminal Code respecting court formalities and the meaning or execution of warrants, summonses and notices to appear, apply in the juvenile court. Regarding bail, the act contains its own provisions (ss. 14-15) which are similar to the ones in the Criminal Code. The juvenile can be freed on bail or on the promise of a person who takes

145 responsibility for him. Where a discharge is refused, the juvenile must not be held in a jail or any other place where adults might be incarcerated, except in unusual circumstances.

The Criminal Code rules also apply in examinations. The act contains no provision on fingerprinting, and here, the Identification of Criminals Act (R.S.C. 1970, c. I-1) would appear to apply. Even though the then solicitor-general stated in the 1968 debate on the draft legislation that this law was not applicable in cases of children and young persons arrested by the police, except by order of the court, the current practice seems to be quite another thing. And the application of the identification act to delinquent juveniles raises a question of legality. Section 2 of this act states that a person accused of a criminal act may be subjected by those who have custody of him to the methods of identification that apply to criminals. It is clearly stated in the Juvenile Delinquents Act, however, that the offence charged is a delinquency and not a criminal act. For this reason, I believe that if the Identification of Criminals Act is applied to delinquent juveniles, this is done illegally.

146 We come to the issue of notification. Already in 1894, the act provided that when the court received a complaint or information against a delinquent juvenile, the

child's parents, or anyone else who seemed to be concerned about what happened to him, could be made aware of this fact. Notice remained at the discretion of the court, however, and the 1894 provision applied only to Ontario. Not until 1908 was the notice to parents made general and also binding on the court. Since that time, the law has not been changed in this respect. However the term "hearing" is hard to define; it seems to be generally understood as meaning " committal for trial and plea."

The court can specify to whom the notice is to be sent, but this power is not discretionary; it is subject to the provision in the act, under which the court must first notify the father, or in his absence the mother, or in her absence the guardian, or in the absence of a guardian, a close relative.

The MacLeod Committee recommended in 1965 that notice of a child's arrest be given to the parents by those who initiated the arrest, and that parents be notified of transfers to the ordinary courts. These proposals were included in Bill C-192 in 1971: parents must receive a notice of arrest
147 that stated the points of the charge as well as the child's right to legal representation; the notice must also state that if parents were not present in court as the law required, they were liable to a summons for contempt of court on the grounds of refusal to appear without valid reason, certain excuses being acceptable to the court. The parents' duty

to be present had been among the proposals of 1929; it was deleted then as being too onerous, and was objected to in 1971 on similar grounds.

Discussion is moving now towards a policy of compulsory notice to parents, drawn up in clear language, at each stage of the process: arrest, information, appearance, and transfer. One point is still at issue: whether or not a young person over age 16 should be given the right to withhold information from his parents unless he has been formally charged. Obviously, this is a problem only where young persons between ages 16 and 18 are dealt with under the Juvenile Delinquents Act.

The hearing: from appearance to ruling on guilt

Before 1857, juvenile offenders underwent the same trial process as adult criminals. That year saw the pioneer act for the more speedy trial and punishment of these offenders. The act introduced changes in procedure: juvenile offenders were to be tried before two or more justices of the peace, though the accused still had the right to choose trial by jury -- a choice he would lose in 1908, when transfer became a decision for the court alone. The 1857 act was silent as to the procedures for entering the plea, the defence, and so forth. The regular rules of criminal law were probably used.

Under a clause of the first Criminal Code of 1892, trials of persons under age 16 were, so far as this seemed expedient and practicable, to be held without publicity and apart from those of other accused persons, and at suitable hours for this purpose. The provision was reworded in 1894 to make it compulsory. The accompanying debate in the Commons reveals that a number of justices had not been applying the 1892 recommendation for trying juveniles in camera and without publicity; they saw it as uncalled-for an impractical.

The 1908 act created a juvenile court with its own special procedure. The act applied wherever it was put in force; elsewhere, the usual rules of criminal law continued to apply to juveniles. It must also be emphasized that the act was conceived in a more or less non-judicial spirit. As I have frequently pointed out, the juvenile court was fashioned, not as a regular tribunal, but rather as a social agency. Events there were more reminiscent of a family conclave than they were of the judicial process.

The MacLeod Committee had much to say about procedure in its 1965 report. The committee wanted to keep youth court procedure simple, without at the same time depriving the young of the protection of the normal rules of procedure, or leaving them with fewer rights than adults enjoyed. It also recognized the need to give more adequate direction to the juvenile court judges.

The 1967 draft legislation for children and young persons suggested reinstating the defendant's right to be tried in the ordinary courts. Another draft provision would have made it possible for parents, when their child had no lawyer, to perform the defence role at trial.

In 1971, Bill C-192 moved towards a more formal court procedure. The bill aroused a storm of protest; sections that were seen as draconian earned it the description of "criminal code". For instance, there was a section that gave the court the power to sentence to indefinite detention any child who refused to testify, take the oath, or sign a statement. Under another section, the court of appeal for juvenile delinquents became the high court, before three to five judges, while adults had access to the ordinary court of appeal before a single judge.

The law we have today is largely the same as it has been since 1908. We can get more information, however, by looking at the practice of the courts as well as the statutes. Thus, among the Criminal Code provisions applied in trials before the juvenile court, we come across the requirement that an information be given in written form and under oath, the defendant's right to a full and complete defence, the rules of evidence for examination, the corss-examination of witnesses, the motion to amend, and the motion to delay.

There are also some differences between Criminal Code procedure and procedure under the Juvenile Delinquents Act. For example, the Juvenile Delinquents Act contains its own provision respecting appeals. The six-month limitation on charges for summary offences under the Criminal Code does not exist for juvenile delinquents. The rules of confession vary as well.

Since the Gault decision, the stress has fallen on reinforcement of children's rights and hence reinforcement of equitable procedure. The emerging movement is one of judiciarization as well as diversion in these cases. One refers to diversion because the goal is to keep as many cases as possible out of the criminal justice system. On the other hand, there is a desire for more judicial form in the youth court and its procedure. It is important for the young to believe in justice, have their rights protected, and just trials in which they can defend themselves. The juvenile court will be a judicial tribunal, and it is in this sense that I have referred to judicialization. At the same time, it will differ from the ordinary courts in having a whole team of specialists and support persons attached to it. Its judges will become arbitrators, with

152 enough background knowledge to assess, not only the points of law at issue, but also the reports presented to them.

Before moving on to the dispositions themselves, I will touch briefly on the ruling on guilt, the sentencing, and the pre-sentence report. The ruling on guilt as well as the passing of sentence have always been exclusive functions of the judge. For some years, however, there has been discussion of separating these two rulings. The ruling on guilt might remain with the juvenile court judge, while that on the sentence could be made by either a judge other than the judge who ruled on guilt who is trained in the social sciences (the European option) or a committee of experts (the American option). We are far from agreement on this, however.

The question of the pre-sentence report is also an interesting one. The law on juvenile delinquency has never has never required a judge to order such a report or take the report into account when sentencing. Thus, it remains at the court's discretion to order the report, which is then drawn up by the probation officer. In practice,
153 however, these reports have been required for several years. The MacLeod Committee recommended in 1965 that they be made compulsory, because they would be useful to the judge and help in the movement of information between treatment centres. Bill

C-192 (1971) incorporated the provisions of the draft legislation of 1966 and made them binding. In the terms of the bill, the pre-sentence report was to be in written form and contain data on the personal, family and environmental background of the young person. It was to be given to his lawyer and he could, if the court so decided, read the report himself.

Various questions remain. What should the pre-sentence report contain? Should it be confidential? Should it be open to challenge like other pieces of evidence? However, there seems to be unanimity on this point: the report is necessary.

151

Dispositions

The striking thing about juvenile court dispositions is their contrast with the dispositions that are customary in criminal law. Their very goals are different, for although they have a punitive ancestry, they have in the course of time taken on a quality of help and understanding. My analysis will include two categories of dispositions: temporary and permanent.

Temporary dispositions

These dispositions are made before the defendant's guilt is established. They may be made before trial -- as bail, the promise to be present, and postponement -- and during trial: pre-sentence detention, detention after sentencing while awaiting transportation to an institution, and detention awaiting transfer to another jurisdiction.

Traces of this practice can be discerned as far back as the act of 1857, At that time, the justice or justices of the peace before whom the accused made his appearance were given the power to set him free on bail awaiting further examination or trial. This is still the law today. In 1869, the Act respecting Juvenile Offenders within the province of Quebec set new standards for the temporary detention of 155 juveniles: any person aged under 16 and charged with a non-capital offence was to be held for trial wherever possible in a reformatory school and not in a common jail. The act of 1894 made this more explicit, stating that any juvenile offender under age 16 and arrested by warrant, who was held pending a preliminary investigation or during his trial or after his trial awaiting his sentence, must be held apart from older persons charged with crimes and offences and persons undergoing sentences of imprisonment. The act thus clearly acknowledged the principle of separating juvenile delinquents in temporary detention from older offenders and habitual criminals.

The 1908 act held to the 1894 restrictions respecting temporary detention of delinquents, and added some new ones. A child could be held elsewhere than in a detention home reserved for the use of children in cases of transfer or when the child was over age 14 and could not in the court's

156 opinion be safely confined in a place other than a jail or lock-up. In a new provision, the law set a penalty for anyone violating this principle.

Another new provision in the act of 1908 was the written or verbal promise to be present added to that for bail. It allowed a child under arrest or awaiting trial to be freed on a promise given by the person who had been notified of the charge. The purpose was to spare children incarceration in a common jail when they were under arrest and there was no detention home reserved for their use.

In 1921, there was a new provision giving the court power to adjourn the hearing of a charge of delinquency for such period(s) as it deemed advisable, or sine die. This preceded any trial or ruling on guilt. It was apparently introduced to enlarge the powers of the court respecting postponement or remand awaiting determination of guilt. Over the years, postponement sine die has been much used by the courts. Its frequent use to dismiss a juvenile defendant without giving him a record has virtually turned it into a final disposition of the court.

This provision for adjournment must not be confused with the "adjournment of the hearing" introduced in 1908 as a final disposition. The former, postponement of the hearing of the charge, took place before trial, and in this context "hearing" included committal for trial, the entering of the 157 plea, and the trial itself. The 1908 adjournment could take place only after the child had been declared a juvenile delinquent; "hearing" in this context meant the subsequent hearing of evidence and opinions on sentencing. The word "disposition" following hard on "hearing" (1924, s. 2) reinforces this interpretation:

[illegible]

> In the case of a child proved to be a juvenile delinquent, the court may adjourn the hearing or the disposition of the case for a determined or undetermined period.

The above distinctions still apply, since the texts of 1908, 1921 and 1924 remained unchanged in the law.

158 In 1938, the Archambault Commission recommended that juvenile courts make maximum use of bail to spare the young corrupting influences in temporary detention. In 1965, the MacLeod Committee suggested certain rules for the use of temporary (also called "preventive") detention. The committee wanted to limit it to cases where the court was convinced that the children would run away in the waiting period or else commit offences dangerous to themselves and the community, or where they were detained by another authority. The 1967 draft legislation took up these recommendations: freedom was to be the rule, and temporary detention the exception. Within 24 hours, except on Sundays and holidays, the arrested juvenile must be brought before a judge who would rule on whether he

should be set free or placed in preventive detention.

Bill C-192 took the same general view. It attempting to reduce the use of temporary detention even more, and had no provision for bail. An arrested juvenile could be released to his parent immediately if they undertook to supervise him and ensure that he was present in the court at the required time. He could also be placed in detention, in which case he had to be set free without unreasonable delay on an undertaking on his or his parents' part that he would be present in court. Detention could only be continued by order of the judge, or in his absence by the clerk of the juvenile court. And the order could only be made in certain specific cases, which were the same as those listed in the 1966 draft legislation.

In practice, the prohibition against holding juvenile delinquents in detention along with adults is not especially enforced or applied, given the inadequate supply of the necessary facilities and services.[1] Suggested solutions for this problem are minimal use of temporary detention combined with extended bail provisions and such other measures for leaving the delinquent at liberty as returning him to his family.

---

1. Report of the federal-provincial study on young persons in conflict with the law (Ottawa 1974, p. 85); and see also "Juvenile Delinquency in Canada" (the MacLeod Report, Ottawa 1965, p. 126).

Final dispositions

160 To repeat, this term includes all measures applied to the juvenile delinquent following conviction. In 1857, these were incarceration in a common jail or house of correction for a term no greater than three months, with or without hard labour, or a fine not exceeding £5, or discharge with or without bail if the justice deemed punishment unnecessary. In addition, the justice could order the restitution of the stolen property or payment of the cash equivalent. These penalties were imposed for offences of simple larceny or offences punishable as such. The only change made in 1869 had to do with the freeing of the accused when punishment was deemed unnecessary: bail was now a requirement.

The Act respecting Juvenile Offenders within the province of Quebec (also 1869) provided that a juvenile under age 16 found guilty of an offence punishable by imprisonment could now be sentenced to detention in one of the province's Certified Reformatory Schools for a minimum of two and a maximum of five years, or he could be sentenced to incarceration in a common jail for a maximum of three months, to be transferred afterwards to a Certified Reformatory School for a minimum of two and a maximum of five 161 years. There was no more hard labour in Quebec except (ss.

6-7) in cases of escape, or of negligence or refusal to obey the rules of the school. Also, under section 4 of the act, any juvenile offender convicted of felony could, by order of the lieutenant-governor acting on a report from one of Quebec's inspectors of prisons, be removed as incorrigible to spend the rest of his sentence in a penitentiary.

Under the 1875 amendment to the law on criminal procedure (c. 43: see page 26 above), an ordinary court dealing with a juvenile aged 16 could now, instead of sending him to penitentiary, sentence him to reform school for a term of not less than two and not more than five years.

The principle of trying delinquent juveniles separately from older offenders and criminals was established in 1892; it was made binding in 1894. The act of 1894 also brought in important new provisions for delinquents in Ontario, including a number of dispositions to replace the traditional incarceration. In that province, juvenile delinquents under age 14 and sentenced to imprisonment could be handed over instead to a home for destitute and neglected children, a children's aid society, or a certified industrial school. In addition, boys under 12 and girls under 13 were now subject to various measures other than imprisonment, ranging from fines to suspended sentences and including placement in foster homes.

The act of 1908 not only extended the definition of delinquency but also increased, qualitatively as well as quantitatively, the range of the court's final dispositions. The Ontario provisions of 1894 were incorporated in the new law; probation now played a leading role, and there was a clear intent to avoid punishment and detention. The court was given criteria to guide its rulings; all were to be made for the child's own good and the best interests of the community. The provision for restitution of property or the money equivalent had gone. It was still possible, however, for the court to order the parents to pay, in the child's place, whatever damages were imposed, though there was no indication of the nature of these damages. The juvenile delinquent remained a ward of the court until he was discharged as a ward by order of the court, or until he reached age 21. This meant that the court could order his return at any time in the wardship period and take further or other proceedings in the case.

The law forbade permanent detention of the juvenile delinquent — that is, detention on or after conviction — in any place where adults were or might be imprisoned.

In 1924, the court's powers were extended; it could now impose on the delinquent any further or other conditions that it deemed advisable. The purpose here was to give the court greater latitude in its work of bettering these children, and clarify its power to make the juvenile respect the rights of individuals — as, for example, in ordering him to make

restitution. The ceiling for fines was raised to $25, a move that was defended in the Commons with the argument that the fine was still the most commonly used disposition
16.1 in western Canada, where the distances made probation ineffective and industrial schools were little used. The western delinquents were generally handed back to their parents; fines were the only practical means of getting to them, and since they reaped rich harvest earnings, the 1908 ceiling of $10 was simply too low. This situation was stressed as being exceptional, for fining was contrary to the philosophy of the juvenile court. Also in 1924, the provision for adjourning the hearing of the case, after guilt was proven, was amended: the court could now, at its discretion, adjourn the final disposition of the case for a determined or an undetermined period. The purpose of this amendment was to correct the problems caused by its predecessor, under which the hearing of evidence could be adjourned, but once proof was established the judge had to deliver his ruling immediately, even though it might have been preferable to reserve judgment, suspend sentence, or hand the child over to a probation officer or a family. Under the new amendment, the judge was no longer obliged to give his ruling as soon as proof was established.

In 1965, the MacLeod Committee reported some statistics
165 on the adjournment sine die. Out of 15,024 cases brought

before them, the juvenile courts had adjourned 1,003 in this manner. The committee pointed out two major disadvantages with this procedure: first, it did not take into account cases where the court might want to free the defendant even if he were guilty, and secondly, it did not allow the court to order the juvenile handed over for treatment. Among the solutions offered by the committee were giving the courts the power to discharge guilty juveniles, and importing the Minnesota system, under which courts had the power to order a 90-day postponement when a child had confessed his guilt but had not yet been stamped as a delinquent. If there was no problem during the 90 days, the child could then be acquitted without being officially declared delinquent.

These recommendations were not picked up in the 1966 draft legislation. The farthest it would go was to separate two stages in the process. In the first of these, once the information had been substantiated, the court proceeded to hear the evidence; then, on this evidence, it could acquit the child, or postpone the case for a maximum of two months, or proceed under a provincial child protection act, or else rule that the defendant was an offender. Only in the last case would there be a second stage: once the defendant was ruled to be an offender, the court then had to decide how to dispose. The available dispositions were similar to those in our present Juvenile Delinquents Act.

Bill C-192 (1971) introduced some novel elements that are worth examining. Once guilt was proven, the court could grant an unconditional discharge. It could also elect to postpone the hearing for two months, at the end of which the defendant was automatically discharged unless he was ordered back in court; the decision as to whether he should return to court during or at the conclusion of the two-month period would be up to the probation officer or officer dealing with conditional discharges. If the defendant was sentenced to a fine, payment was deferred until after he had reached age 21. He could also be sentenced to compensate his victim and any others who had suffered losses; and here again, payment was deferred until after he had reached age 21.

The change with the greatest impact had to do with offences which, if the child were an adult, could mean 164 sentences of death or life imprisonment. For dealing with such offences, the bill gave the court the power to either discharge the guilty party or place him in detention until age 21, at which time he would have to appear for sentencing before an ordinary court. This provision aroused general protest. According to then Solicitor-General Goyer, the change had been made to correct the inadequacies of earlier dispositions to the effect that when a child was ruled guilty of an offence which, if he were an adult, could have meant sentences of death or life imprisonment, the court had two choices: transfer to the ordinary courts where, though children could not be hanged, he might be sent for life imprisonment, and a sentence of detention until age 21, when he would be set free without knowing whether he would be rehabilitated or not. By the new disposition, the court had control over the individual until after age 21, and could thus attend to his complete rehabilitation.

Another provision in Bill C-192 that provoked strong opposition had to do with children who were found guilty of mistreating animals or of offences connected with the operation of motor vehicles or boats. In these cases, the court
168 could issue the juvenile with a lifetime prohibition against the driving or operation of an automobile or boat. Opponents argued that this was unjustifiably harsh, for the juvenile would suffer a permanent social and economic handicap at a time when he was just beginning his life, and no court could know what sort of adult he would turn out to be.

Today, growing importance seems to be attached to the need to force judges to give the reasons for their rulings.

Transfer

109 We come now to one of the most important dispositions of the law for juvenile delinquents: this is transfer, the power of the court to waive its jurisdiction in favour of another jurisdiction. Once it is applied, the juvenile becomes subject to the rules and penalties of the ordinary courts, and, despite the fact that he is a minor, ceases to benefit from the special provisions of the juvenile delinquents act.

Transfer has existed since 1857, when the act provided that the accused could elect to have a jury trial; the same choice was available to the justices. In 1908, the accused lost this option of jury trial. Now, only the court had the power of referral. However, the law did state certain explicit conditions: the act with which the child was charged had to be a criminal act, and the child must be over age 14. Otherwise, the court's power was completely discretionary, guided only by two vague criteria in the act: transfer was to be made if in the opinion of the court the good of the child and the best interests of the community required it. These criteria — the good of the child and the best interests of the community — were left undefined. Since 1908 the law has remained unchanged in this respect.

110 It was pointed out in 1965 by the MacLeod Committee

that the criteria in transfer cases were highly subjective, and notions of the good of the child and the best interests of the community varied from judge to judge. One of the most commonly-used yardsticks was the seriousness of the offence. The committee noted that this was contrary to the philosophy of the law: it featured the offence when the law was trying to focus on the offender. Among the committee's several recommendations was this: the waiver order should only be made after extensive study of the defendant's background and the circumstances surrounding the offence, and written reasons for the decision to transfer should accompany the order and be conveyed to the ordinary court. The committee suggested that the ordinary court rule on the case but that the defendant then be returned to the juvenile court for sentencing; at this stage, transfer could be requested by the defendant as well as by the Attorney-General.

The 1967 draft legislation picked up the last recommendations mentioned above, but added other elements to them. Transfer could be requested by either the defendant or the Attorney-General; it would then be made for a ruling on guilt only, and the juvenile court would maintain its sentencing power. The judge could also waive jurisdiction, in which case he could transfer for trial and sentencing, or for trial only, and maintain his sentencing power.

The provinces did not care for the idea of transfer from the ordinary to the juvenile court for sentencing. They asked that the status quo be maintained in this area. Their request had its impact, for the provisions in Bill C-192 were similar to those of the 1908 act, with the added obligation for the court to conduct a social investigation and rule that the young person could not in fact be dealt with in any juvenile institution, and transfer was the only answer.

Transfer is one of the dispositions that still have various questions hanging over them. Will the juvenile defendant be given the right to request a transfer? Will a preliminary report be required? Must judges give reasons for their rulings? Should transfer to the juvenile court be authorized in the cases of adults of little maturity and intelligence? The answers are still to come. However, one thing is certain: transfer should never be used to sidestep such problems as the inadequacy of proper treatment facilities for the young.

Appeal

172

It was not until 1929 that there were special appeals procedures for appealing decisions of the juvenile court. Before that time, the appeals procedure applied was that used in criminal law before the ordinary courts.

The rules respecting appeals have already been outlined. They call for little comment, as they have been the same since the acts of 1929 and 1932, at which latter date appeals deadlines were introduced. In 1947, a bill was brought into the Senate to empower the parent or guardian of a juvenile delinquent to make an appeal from the juvenile court. The aim was to correct an injustice, for in areas without a juvenile court these cases were tried by magistrates, and there was then, apparently, no right of appeal. The bill never got beyond its second reading.

In 1965, the Macleod Committee recommended giving both defendant and Crown the right of appeal to the court of appeal for any reason that was purely a matter of law or any other reasons that the court of appeal found acceptable. 172 The committee's objective was to expand the appeals procedure, which it regarded as too restrictive. The 1967 draft legislation on children and young persons picked up the committee recommendations and added a right to appeal the court of appeal's decisions to the Supreme Court of Canada on any point of law that had been the subject of a dissenting opinion in the court of appeal, or any other point of law permitted by the Supreme Court.

In 1971, Bill C-192 provided that all cases eligible for appeal must be heard by the court of appeal, appeals division, before either three or five judges, depending on the case. There was also provision for an appeals procedure from the decision of the court of appeal to the Supreme Court of Canada. It was strongly attacked on the grounds of expense and risk for the young defendant wanting to appeal. An adult found guilty on summary conviction was in a better position than a juvenile, for he could appeal to the criminal division of the court of appeal.

Like many others, this disposition is open to debate and fresh solutions. Certainly, access to appeal must be made as easy as possible for the young; and yet the avenue must be left with a minimum of legal form and strictness if their protection and their own rights are to be assured.

Chapter IV

The present law

175

This chapter will attempt to give as clear a description as possible of the present Juvenile Delinquents Act [1] (R.S.C. 1970, c. J-3), that is to say the piece of legislation currently used in dealing with cases of delinquency. To do this I return to the headings devised for the purposes of analysis: the philosophy, the participants, the court, and procedures. Unless otherwise noted, the sections referred to are those of the 1970 act.

Philosophy

The philosophy behind the law is found in section 3 (2), according to which a child who commits a delinquency is to be dealt with, not as an offender, but as one in a condition of delinquency and requiring help and supervision.

This approach comes up again in section 38, with the emphasis on giving the juvenile delinquent as near as may be the care, custody and discipline of a father or mother; for the juvenile delinquent is no criminal, but rather a misdirected child in need of aid, encouragement and help.

---

1. The present law applies to all the provinces of Canada with the exception of Newfoundland. The province of Newfoundland has its own legislation dating from 1944 and entitled The Child Welfare Act. It has remained in force under the agreement made at the time of Newfoundland's entry into Confederation in 1949.

176 The participants

Lawyers

The probation officer is the only person authorized — and under the act, actually obliged — to be present in court (s. 31):

[illegible]

> It is the duty of the probation officer ...
>
> b) to be present in court in order to represent the interests of the child when the case is heard.

It must be added that (s. 32) all probation officers are subject to the orders of the judge. Representatives from the juvenile court committee may also be present (s. 28 (2)).

There is no provision with regard to the minor's representation by a lawyer in the course of the proceedings — the appearance, entry of the plea, and so forth. However the right of all individuals to legal representation is recognized in the Canadian Bill of Rights (see Appendix E).

It is hard to tell what the implications might be if the Bill of Rights were brought to bear on the Juvenile Delinquents Act and the question of the right of a minor to representation. Unfortunately, there is nothing in case law to enlighten us.

177 At the same time, we must take note of the trend in current practice, in Quebec at least. A few years ago, the

Quebec government launched a state-financed legal-aid scheme whereby those who are unable to afford the services of a lawyer when they need one can obtain these services free.

These legal services are available on the same basis to young people summoned before the juvenile court. Even though the texts of the law are silent as to the possibility of a minor's having legal representation, no juvenile court judge in Quebec would be well-advised to refuse to allow the presence of a lawyer representing the minor's interests.

Police

The police officer plays an important role, at the time of arrest as well as the laying of the information and the recording of voluntary statements by the minor. There is no provision in the act that deals directly or indirectly with the police.

Parents

172 The provisions having to do with parents are sections 10, 20 (2), 22, and 32. Section 20 (2) deals with the obligation that can be placed on parents, by court order, to contribute to their child's support when he or she is turned over to an institution. Under section 22, the court may order the parents to pay whatever fine or damages or costs may be

imposed in the case, when they have, by neglecting to exercise due care of the child, or otherwise, led the child to commit the offence.

The Juvenile Delinquents Act (s. 10) also provides that notice of the hearing of any charge of delinquency against a child must be served on the parents or their legal substitutes. This applies to all children dealt with under the act, whatever their age. The notice is of the hearing of the charge, and not of the arrest or temporary detention of the child. There is no provision that obliges the parents to be present in court. Section 33 deals with the responsibility of the parent or guardian who, out of negligence, contributes in some way to the delinquency of the child. If found guilty, he or she is liable to a fine not exceeding $500 or imprisonment no exceeding two years, or both.

The judge

177 The judge is an important personage. The role conferred on him by the act puts him in possession of major decision-making powers with which he can mould the child's destiny.

Among the powers assigned to him by the law are the power to decide guilt and the power to pass sentence. In these rulings, he enjoys complete discretion. Section 20 (1) lists the dispositions available to him for sentencing. Of these, I will note subsection (g), under which he may

textual

> impose upon the delinquent such further or other conditions as may be deemed advisable.

No limits are placed on the judge, then, in the use of his decision-making power to sentence.

It might be pointed out here that since 1968, for adult criminals, there has been a provision in the Criminal Code (s. 661) under which the judge may, at his discretion, request a pre-sentence evaluation. No provision of this kind is to be found in the Juvenile Delinquents Act, except possibly the power of the judge (s. 31) to order an investigation by the probation officer. Although the nature of the investigation is unspecified, we may expect, looking at current practice, that it will produce a pre-sentence report.

In addition, the judge has the power to determine who shall be served notice of the hearing of the charge. He can also authorize newspaper or other publication, appoint probation officers, and order a juvenile delinquent transferred to an ordinary court if in his opinion the good of the child and the interests of the community require it. The judge, then, is the master of the facts and the law.

Social agencies

The only agencies mentioned in the act are the juvenile court committee and the probation service. The juvenile court committee is usually a children's aid society. Its duties are (s. 28 (1)):

> to meet as often as may be necessary and consult with the probation officers with regard to juvenile delinquents, to offer, through the probation officers and otherwise, advice to the court as to the best mode of dealing with such delinquents, and, generally, to facilitate by every means in its power, the reformation of juvenile delinquents.

textual
[illegible]

The probation officer, appointed by the court or under provincial authority, must (s. 31) carry out any investigation the court may order, be present in court to represent the interests of the child, provide necessary assistance and information to the court, and finally, take charge of the child, before or during trial, as may be directed by the court. This last duty may (s. 20 (1) d) be prolonged after the trial.

Despite the probation officer's air of independence, strongly implied in section 31 of the act, we must not forget the provision in section 32 that any probation officer, however appointed, for all purposes of the act, is under the control and subject to the direction of the judge of the court with which he is connected. As a result of this, the role of champion of the child's rights and interests that seemed to have been given to the probation officer becomes somewhat clouded.

Neither the committee nor the probation officer has any power to force the judge to make any ruling whatsoever, and his decision to consult them is made at his own complete discretion.

182. The juvenile court

The court itself is established by the provinces. It has exclusive jurisdiction over delinquent juveniles. The juvenile delinquent is defined as being a child who has committed an offence. The term "child" is usually understood as referring to a boy or girl under age 18, except where the age limit is set at 16 (s. 2). The maximum age for juvenile delinquency is not consistent across Canada; it varies from 16 to 18. The age is 16 in Ontario, Saskatchewan, New Brunswick, Nova Scotia, Prince Edward Island, the Yukon, and the North-West Territories. It is 17 in British Columbia, and 18 in Quebec and Manitoba. In Alberta, the age is 16 for boys and 18 for girls. And in Newfoundland, where the Juvenile Delinquents Act is not in force, the age limit set by provincial law is 17.

There is also a minimum age for juvenile delinquency. The Criminal Code stipulates (ss. 12 and 13) that no person under age 7 can be found guilty of an offence; and for a person over age 7 but under age 14 to be held criminally
183 responsible, it must be proven that he was able to understand

the nature and consequences of his conduct, and to realize that he was doing something bad.

The offence of delinquency is any of the violations listed in section 2 (1), against

textuel

> any provision of the Criminal Code or of any federal or provincial statute, or of any by-law or ordinance of any municipality, or ... sexual immorality or any similar form of vice ...

A child committing one of these violations must be brought before a juvenile court in precedence to any other court (ss. 8 (1) and 4 (1)); this is why we refer to exclusive jurisdiction.

The court acts as a parental substitute. Since the court represents the state, we refer to the state as parent. From the moment a child comes under the jurisdiction of the juvenile court, the court must not only deal with him as someone in need of help and encouragement, but also, as far as possible, give him the same care and custody and discipline that he would receive from his father and mother (s. 38).

Procedure

184 This reflects the philosophy of the act. The general drift is stated in section 17 (1), which provides that proceedings may be as informal as the circumstances permit, consistent with a due regard for a proper administration of justice. This section must be seen in conjunction with section 5 (1)

already mentioned, which qualifies juvenile court prosecutions and trials as summary, and governed *mutatis mutandis* by the provisions of the *Criminal Code* relating to summary convictions.

This whole approach, with its penchant for informal proceedings, has been much criticized. Some have argued that it leads to serious abuses of justice, and generates discretionary despotism instead of moderation and objectivity. Hence, for these critics, due process must be buttressed in order to give minors equal protection with adults.

An example may be given of the problems that arise. At the time of his arrest or detention, the minor has no assurance that he will be swiftly informed of the reasons for such arrest or detention. As with the instance of legal representation, there is a specific provision to this effect in the Canadian Bill of Rights, but the bill's application to persons with the status of minors is still under discussion. Meanwhile, practice varies from province to province and even from one youth court to another. There is no certainty as to the rights of minors in this respect.

The question of procedural informality has stimulated comment from the youth courts themselves. They have invariably been of the opinion that section 5 (1) must not be used in any way that would be detrimental to the accused person.

Given the vagueness of the terms used in the act, it is hard to know precisely when and how *Criminal Code* procedure applies. I will attempt to give a brief outline of this procedural problem by retracing the usual steps that occur in a case before the juvenile court. For this purpose, I am separating the process into three main stages:

-- the pretrial period, from the arrest or the issuing of a warrant to the appearance;
-- the trial, from the appearance to the ruling on guilt; and
-- the final disposition, its application, and the appeal.

12.-

The pretrial period: police (arrest, questioning, confession, legal representation), information, and notices.

Police

The minor's introduction to the penal system often begins with his arrest by police at the scene of the offence, or the execution of an arrest warrant issued against him. It can also take the route of a summons to appear. What are the rules governing these procedures?

In arrests, the rules are those of criminal law as expressed in the *Criminal Code* and the Identification of Criminals Act. There is no reason to believe that these rules are not applied to minors. Should they not be, the minor would in fact be less protected by being dealt with under an act the chief purpose of which is to give him protection!

Regarding the presence of the defendant's lawyer in court, the acknowledged right of any adult under the Canadian Bill of Rights does not seem to have official recognition in the case of minors.

Police questioning of minors and any confessions they may make to police have in the past been governed by section 470 of the Criminal Code together with the criteria of the ordinary courts, according to which a confession to be admitted as evidence must have been given freely and willingly. There were no special criteria for confessions made by minors until around 1958.[1] The courts have never entrenched them as rules of law, however, and they remain simply guidelines today.

The information

Under article 720 (1) of the Criminal Code, anyone can lay an information. Information and prosecution must not be confused. In the act, the prosecutor is defined as being the informant or the Attorney-General or their respective counsel or agents. It would seem that the informant as well as the Attorney-General may instigate actions against minors before the juvenile court.

Notice

We have already seen that notice of the hearing of the charge must (s. 10 (1)) be served on the parents or guardian; however, the law contains no provision for notice of arrest or detention awaiting trial.

---

[1] See R. v. Jacques (1958) 29 CR 249

The trial, from the appearance to the ruling on guilt

The appearance in court is the time when the charge is formally made, the plea entered, and temporary dispositions decided on. Indictments are governed by section 729 of the Criminal Code, each count of an indictment applying to a single transaction and outlined according to the standards prescribed by sections 510 and 512 of the code.[1] The courts have made juvenile court judges subject to the requirements of the Criminal Code regarding informations, obliging them (Code, ss. 736-737) to explain to the minor the substance of the information against him. The obligation is stricter here than in the ordinary court. It was decided that the juvenile court judge should not only follow section 736 of the Criminal Code — explain the substance of the charge to the defendant and ask him whether he pleads guilty or not guilty — but also satisfy himself that the minor had been given all needful information and understood the nature and seriousness of the complaint before entering his plea.[2] The appearance is when

---

1. Re. Hipke (1967) 1 CCC 66
   R. v. Veltri (1963) 3 CCC 145
2. R. v. B. (1956) 116 CCC 382
   Smith v. Chmielewski (1959) 124 CCC 71
   R. v. H. and H. (1947) 88 CCC 8

189 bail is either granted or refused. There has been a ruling [1] that in bail hearings before the juvenile court, neither the Bail Act (R.S.C. 1970, c. 2) nor section 457.7 of the Criminal Code pertaining to bail should apply. The juvenile court's jurisdiction is absolute as regards applications for bail.

Rules of evidence

The *Criminal Code* rules of evidence regarding testimony, examination and so forth apply *mutatis mutandis* and at the court's discretion.

There are two B.C. Supreme Court rulings that shed light in this area. Taking sections 3 (2) and 38 of the Juvenile Delinquents Act together, it was decided that the judge of the juvenile court was not subject to the rules of evidence applying in ordinary courts because this would be incompatible with the aims of the act. The juvenile court judge can use his discretion and bring his own experience to bear on his decisions, and thus he retains the power to hear unsworn testimony and accept or reject hearsay evidence, and
190 take these for what they are worth. [2] This must not, however, be used as an excuse or argument for refusing the minor more substantial evidence, when such evidence is easily obtainable. [3]

Now, as for some years past, there seems to be something

---

1. *Re E. and the Queen* (1976) 25 CCC 238
2. *R. v. Moore* (1974) 22 CCC 189
3. *R. v. Hirvonen* (1969) 3 CCC 140

of a swing back to formality and a desire for more narrowly-definedprocedure. In this respect the Gault decision [1] has been a turning point.

The final disposition, its application, and the appeal

Disposition and application

The court's discretion is exercised in the final disposition as it is in the ruling on guilt. Such discretionary power is present in the ordinary courts, but in a more limited sense; thus, a pre-sentence report can channel the use of the court's discretion. As far as sentencing is concerned, penalties are specified by the Criminal Code, and the court's discretion often finds itself limited by the periods prescribed. Admittedly, the Juvenile Delinquents Act (s. 20 (1)) provides a list of possible dispositions, but these do nothing to limit the broad discretionary power of the court. Subsection 6 is proof enough of this:

> ... the court may, in its discretion ... impose upon the delinquent such further or other conditions as may be deemed advisable.

Once they are decided on, the application of these dispositions is a matter for agencies -- probations services and institution -- which are not under the court's authority. Various problems arise in application, and they are made more

---

[1] In re Gault, Supreme Court of the United States 1967, p. 62A. 387 U.S. 1, 87 S. GT. 1428, 18 L. ED. 2nd 527

more complicated by overlappings of authority: the agencies are established and run by the provinces, and the juvenile court has no power over them.

Appeal

192

Section 37 of the act contains specific rules governing appeals. These differ from the ones in the Criminal Code. To summarize: appeals are made by special leave to the provincial supreme court. This leave is given by a justice of the supreme court, at his discretion, if he considers it to be essential in the public interest or for the due administration of justice. Application for leave to appeal must be made within ten days of the making of the conviction or order complained of in the appeal. The period may be extended for a maximum of 20 more days. Appeal from the supreme court's decision may be made to the court of appeal by special leave of that court.

Conclusion

194 I have attempted in these pages to serve as a guide through the history of the law regarding juvenile delinquents. Along the way, a number of interesting points have emerged; and among these may be mentioned the fact that this stream of law has its source in the year 1857. Most writers have ignored 1857 as the date of the pioneer legislation for juvenile offenders. It applied throughout what are now Ontario and Quebec and were then the two Canadas. This was the time of Union; Confederation would not arrive until 1867.

Another point I have made with some emphasis is that 1929, so often described as an important date in the development of the law, was in fact no such thing; and I have explained why this is so. The 1908 act represented a complete overhaul of the system, and there have been few changes since that time. The fact is that, beginning with the first stirrings of concern for delinquent juveniles around the middle of the nineteenth century, philanthropic agencies, followed in turn by state agencies, assumed a steadily-increasing responsibility for juvenile delinquents. Then came the creation of the juvenile court to take exclusive charge of these delinquents. Gradually, the court's jurisdiction grew. Before it was
195 created, delinquency was simply equivalent to theft; when it was created, as I have tried to show, the range of delinquency

was considerably enlarged; since then, the process has continued, with the addition in 1924 of the idea of sexual immorality or any similar form of vice, and the raising of the upper age limit for those within the court's jurisdiction.

Since the early sixties, we have seen serious challenges to the role of the youth court and the definition of delinquency. And although the basic principles of the law for juvenile delinquents have remained unchanged, it must not be assumed from this that there has been no change in thinking, no attempt at reform. In fact, a number of committees were created to look at possible changes, and these committees delivered a host of recommendations. Several draft laws and bills have been introduced, though none has blossomed in the statute book.

There is no cause for surprise in this record of failure; the law is among the last elements to change in any society. It is rare for laws to lead the way; they are changed mainly by the tide of events and the work of pressure groups. This is why they are very often found responding to needs that have long been felt, or even ceased to be felt.

The law is not the sharpest of weapons for achieving social change, but it is nonetheless essential to social change. It is the written evidence of the fulfilment of the desires expressed in its preambles, as has been the case with some of the legislation for juvenile delinquents. Laws are imperfect, and sometimes cause serious problems. Thus, the law that has formed the subject of this study was brought into being for a particular group, delinquent minors. And yet the very definition of the group for which the law is intended remains problematical. How, indeed, are we to define a delinquent minor, when the provinces not only fail to reach agreement on a uniform age for the group, but even sometimes fall short of unanimity on the nature of delinquency itself?

Laws also raise problems when they are applied. If a law is not responding to real needs, or to the ideas of the very people it affects, it is going to be rejected and its philosophy will not be applied along with its provisions.
197 At this point, one realizes the importance of genuine communication between the summit and the base, the government as lawmaker and the people. The law for juvenile delinquents has had, and still has, to confront this problem.

I have seen the development of this law as part of the broader stream of social reform in general. Each and every one of us is aware of the changes taking place around him, numerous, powerful and swift. They quickly affect every social stratum, and they strike deep. They challenge our received ideas about what relations ought to exist between individuals, between groups, and between these individuals and groups and the government. We ourselves are both agents and objects in the evolution of society. And the state has its role as well; it is the state that sets the standards and centralizes the decisions of society. The effects of social evolution can be positive or negative; they can oppress or liberate. For this reason, change in society must be launched and then established with care. And reforming a law is such a change; it is a part of the evolution of society; it is a response to challenge and changing directions.

198 In the case of the law for juvenile delinquents, the changes suggested and/or accepted have been geared towards improving conditions of treatment for that group. These changes have been moving towards something better; they have often betokened a new or renewed social awareness. Not all were necessarily positive, however, and some have been described by their critics as steps back into the past. None has been able to establish the balance of powers between the individual and the state. Over the years, the state has seized more and more powers — for example, it has taken the place of the victim of a crime. There is imbalance as well between the importance attached to the protection of the individual and that given the protection of society. Beneath the surface where great concern is professed for the individual, the protection of society has taken the lead in the minds of our lawmakers.

Nor has the justice system escaped the impact of the expansion in such sciences as psychology. This expansion has meant specialization in the personnel connected with the courts and institutions for minors. As this has occurred, the problems of delinquency and crime in general has ceased to be the preserve of the judges and the lawyers.

However it seems to me that for all the specialists 19.1 have arrived on the scene, the core of the problem is still untouched. It is essential for us to define the elements of a social policy that truly reflects our society, especially in the present context, in which society, dominated by industrial and technical values, tends to depersonalize human relations. The policies in the areas of delinquency and criminal behaviour must form part of a comprehensive collection of policies working to build a new society in which the quality of life would be improved, where men and women would be allowed to seek personal fulfilment in a context of shared aspirations, and to live in harmony.

These are challenging goals, certainly, and the fact that the social balance rests on a contemporary system in endless flux makes them all the more challenging. The specialists are agreed that this is the direction to follow. There may be differences of opinion as to the best means of getting there. And yet has not advance occurred in human society through experiment, productive and unproductive?

Appendix A

Chronological listing
of reports, conferences
and bills, respecting
juvenile delinquency

Fol

1938	Report of the Royal Commission to investigate the penal system of Canada (Ottawa, 1938) (Archambault Commission)
1956	Report of a Committee appointed to enquire into the principles and procedures followed in the remission system of the department of Justice of Canada (Ottawa, 1956) (Fauteux Committee)
1961	Appointment by the justice department of the Committee on Juvenile Delinquency (MacLeod Committee)
1965	Report of the Committee on Juvenile Delinquency (Tabled in the House, Feb., 1966)
1967	First Discussion Draft for an Act respecting Children and Young Persons
1968	Federal-Provincial Conference of Ministers to discuss the draft legislation, Jan. 10-11, and its published Proceedings (Ottawa, 1968)
1970	First reading of Bill C-192, Nov. 16
--1971	Proceedings of the standing justice committee concerning Bill C-192, an Act respecting Juvenile Delinquents, and repealing the previous Juvenile Delinquents Act (House of Commons, 3rd Session of the 28th Parliament, 1970-71)
	Briefs presented to the standing justice committee regarding Bill C-192 on juvenile delinquents (House of Commons, 3rd Session of the 28th Parliament, 1970-71)

1971	Second reading of Bill C-192, Jan. 13-14; the bill is referred to the standing justice committee
1972	Appointment of the federal-provincial study group
202 1974 *	Report of the federal-provincial study group on young persons in conflict with the law (Ottawa, Aug. 8, 1974)
1975 *	Young Persons in Conflict with the Law; report of the Solicitor-General's Committee on proposals for new legislation to replace the Juvenile Delinquents Act (Ottawa, 1975)

---

* These two reports are not included in the present study.

Appendix B

Chronological listing
of the acts respecting
juvenile delinquents

1857	An Act for the more speedy trial and punishment of juvenile offenders (S.C. 1857, 20 Vic. c. 29)
1859	An Act respecting the trial and punishment of juvenile offenders (Cons. S.C. 1859, c. 106)
1869	An Act respecting the trial and punishment of juvenile offenders (S.C. 1869, 32-33 Vic. c. 33)
	An Act respecting Juvenile Offenders within the province of Quebec (S.C. 1869, 32-33 Vic. c. 34)
1875	An Act to amend the Act respecting Procedures in Criminal Cases and other matters relating to Criminal Law (S.C. 1875 c. 43)
1886	An Act respecting Juvenile Delinquents (R.S.C. 1886 c. 177)
1892	An Act respecting the Criminal Law (S.C. 1892, 55-56 Vic. c. 29): Part II, ss. 9-10, and Part LVI, Trial of Juvenile Offenders for Indictable Offences
1894	An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders (S.C. 1894, 57-58 Vic. c. 58)
1908	An Act respecting Juvenile Delinquents (S.C. 1908, 7-8 Ed. VII c. 40)
1912	An Act to amend the Juvenile Delinquents Act, 1908 (S.C. 1912, 2 Geo. V c. 30)
1914	An Act to amend the Juvenile Delinquents Act (S.C. 1914, 4-5 Geo. V c. 39)
1921	An Act to amend the Juvenile Delinquents Act (S.C. 1921, 11-12 Geo. V c. 37)

1924	An Act to amend the Juvenile Delinquents Act, 1908 (S.C. 1924, 14-15 Geo. V c. 53)
1927	An Act respecting Juvenile Delinquents (R.S.C. 1927 c. 108)
1929	An Act respecting Juvenile Delinquents (S.C. 1929, 19-20 Geo. V c. 46)
1932	An Act to amend the Juvenile Delinquents Act (S.C. 1932, 22-23 Geo. V c. 17)
1935	An Act to amend the Juvenile Delinquents Act (S.C. 1935, 25-26 Geo. V c. 41)
1936	An Act to amend the Juvenile Delinquents Act, 1929 (S.C. 1936, 1 Ed. VIII c. 40)
1947	An Act to amend the Juvenile Delinquents Act, 1929 (S.C. 1947, 11 Geo. VI c. 37)
1949	An Act to amend the Statute Law (S.C. 1949, 13 Geo. V c. 6): s. 25
1951	An Act to amend the Juvenile Delinquents Act, 1929 (S.C. 1951, 15 Geo. VI c. 30)
1952	An Act respecting Juvenile Delinquents (R.S.C. 1952 c. 160)
1970 *	An Act respecting Juvenile Delinquents (R.S.C. 1970 c. J-3)

---

* The 1970 Juvenile Delinquents Act (s. 2 (1)) was amended by S.C. 1970 c. 17, s. 3 (Appendix B (12)), which substituted a justice of the Supreme Court for a judge of the Territorial Court of the Yukon.

Appendix C

Listing by dates of
House of Commons
and Senate debates
on the law respecting
juvenile delinquents

House of Commons

207	1857 *	May 19 and 23, and June 10
	1869	May 21 and June 11, 18, 19 and 22
	1892	Mar. 8, Apr. 12, and June 24 and 28
	1894	May 15, and June 18 and 25
	1908	June 19 and July 8
208	1912	Nov. 20 and Dec. 7 (1911); Jan. 22 and Mar. 12
	1914	May 5 and 11, and June 12
	1921	May 6, 13, 21 and 26
	1924	Apr. 2 and June 23
	1929	Apr. 4 and 29; May 1, 10 and 20, and June 4 and 12
	1932	Feb. 10 and 16, and Apr. 7
	1935	June 17, 18 and 28, and July 5
	1936	May 8, and June 2, 8, 15 and 23
	1947	June 6, 23 and 24
209	1949	Dec. 7 and 10 (1948); Sept. 28 and 29; Oct. 4, 6, 7 and 21, and Dec. 5 and 7
	1951	May 30, and June 6 and 7

---

* There was no Hansard at this time, and Assembly debates were reported in the newspapers; those referred to above can be found on microfilm in the National Library as: Canada (Prov.) Parliament / Parliamentary Debates # 1, 1846, 1854-58.

Senate

210	1869	June 7, 8, 9, 17, 18 and 22
	1894	Apr. 24, and May 1, 10 and 11; June 11, 13 and 15, and July 23
	1908	Apr. 4, 9, 17, 19, 22 and 24 (1907); May 21; June 3, 4 and 16, and July 20
211	1912	Apr. 4, 20, 26 and 27 (1911); Jan. 24 and 30, and Feb 1; Feb. 25, and Mar. 6 and 7 (1913)
	1914	May 13, 15 and 20
	1921	May 23, 25 and 26
	1924	June 25 and 30
	1929	May 21, 22 and 28
	1932	Mar. 1, 4 and 8
	1935	June 4, 5, 11, 12 and 13
212	1936	June 16 and 17
	1947	May 12 and 14, and June 4 and 27
	1951	May 16, 17, 23 and 28, and June 20

Appendix D

The analytical grid

Analytical grid

2,1 1. Objectives -- as defined in the document examined, if any

Philosophy

2. Philosophy -- basic principles, overall spirit
   concept of delinquency
   concept of treatment

The juvenile court

4. Origins and development of the court; the establishing of such courts, their composition and role, and foreign influences
4. Material jurisdiction of the court: definition
6. Extent of the material jurisdiction of the court
8. Personal jurisdiction of the court over delinquent juveniles
10. Personal jurisdiction of the court over adults

Participants

14. Lawyers
16. Police
18. Parents
20. Judges
22. Social agencies

Procedure

215

24. General problem of due process of law; due process vs. the rights of minors
26. Police stage: arrest, questioning, the minor's statement
28. Diversion
30. The information and the laying of the charge
32. Notice
34. Appearance
36. Plea
38. Trial: rules, admissibility of confession
40. Prosecution
42. Defence
44. Pre-sentence evaluation
46. Confidentiality: publicity, in-camera proceedings, the minor's record
48. Ruling on guilt
50. Ruling on the final disposition
52. Temporary dispositions (before sentencing)
54. Application of the final or permanent dispositions
56. Appeal
57. Foreign influences
58. Constitutional issues
60. Reconsideration of the final dispositions

Appendix E

Excerpts from

The British North America Act

and

the Canadian Bill of Rights

Appendix F

Jurisprudence

Jurisprudence

20c *In re Gault*, Supreme Court of the United States, 1967, p. 62A. 387 U.S. 1, 87 S. GT. 1428, 18 L. ED. 2nd S27

R. v. H. and H. (1947) 88 CCC 8

R. v. Jacques (1958) 29 CR 249

R. v. Veltri (1963) 3 CCC 145

Re E. and the Queen (1976) 25 CCC 238

Re Hipke (1967) 1 CCC 66

R. v. B. (1956) 116 CCC 382

R. v. Hirvonen (1969) 3 CCC 140

R. v. Moore (1974) 22 CCC 189

Smith v. Chmielenski (1959) 124 CCC 71

Appendix G

The act of 1857

Diagram

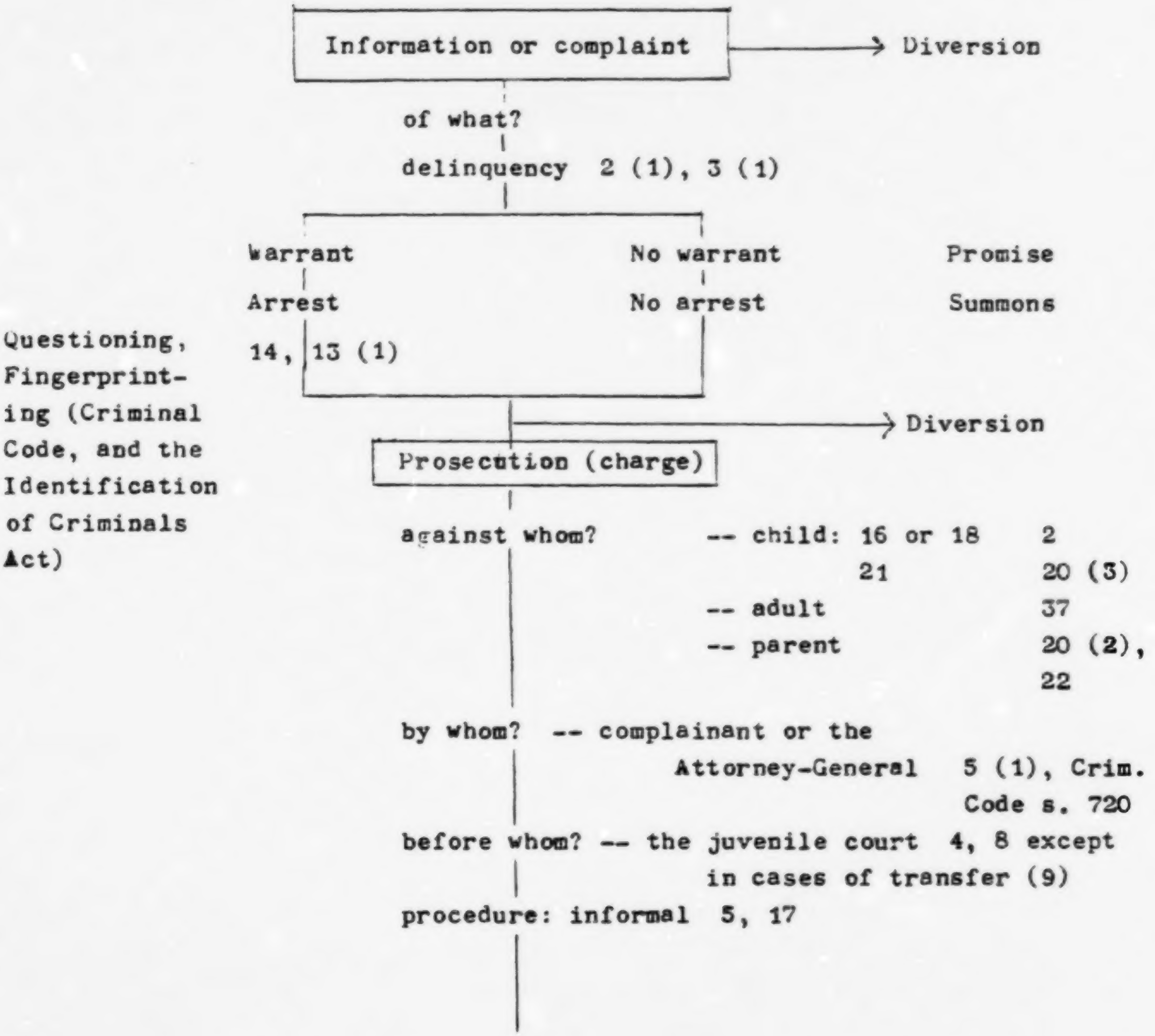
of

the Juvenile Delinquents Act

process

Philosophy 3 (2)

Interpretation 38- 39



Information or complaint → Diversion

of what?

delinquency 2 (1), 3 (1)

Warrant — Arrest — 14, 13 (1)

No warrant — No arrest

Promise

Summons

Questioning, Fingerprinting (Criminal Code, and the Identification of Criminals Act)

→ Diversion

Prosecution (charge)

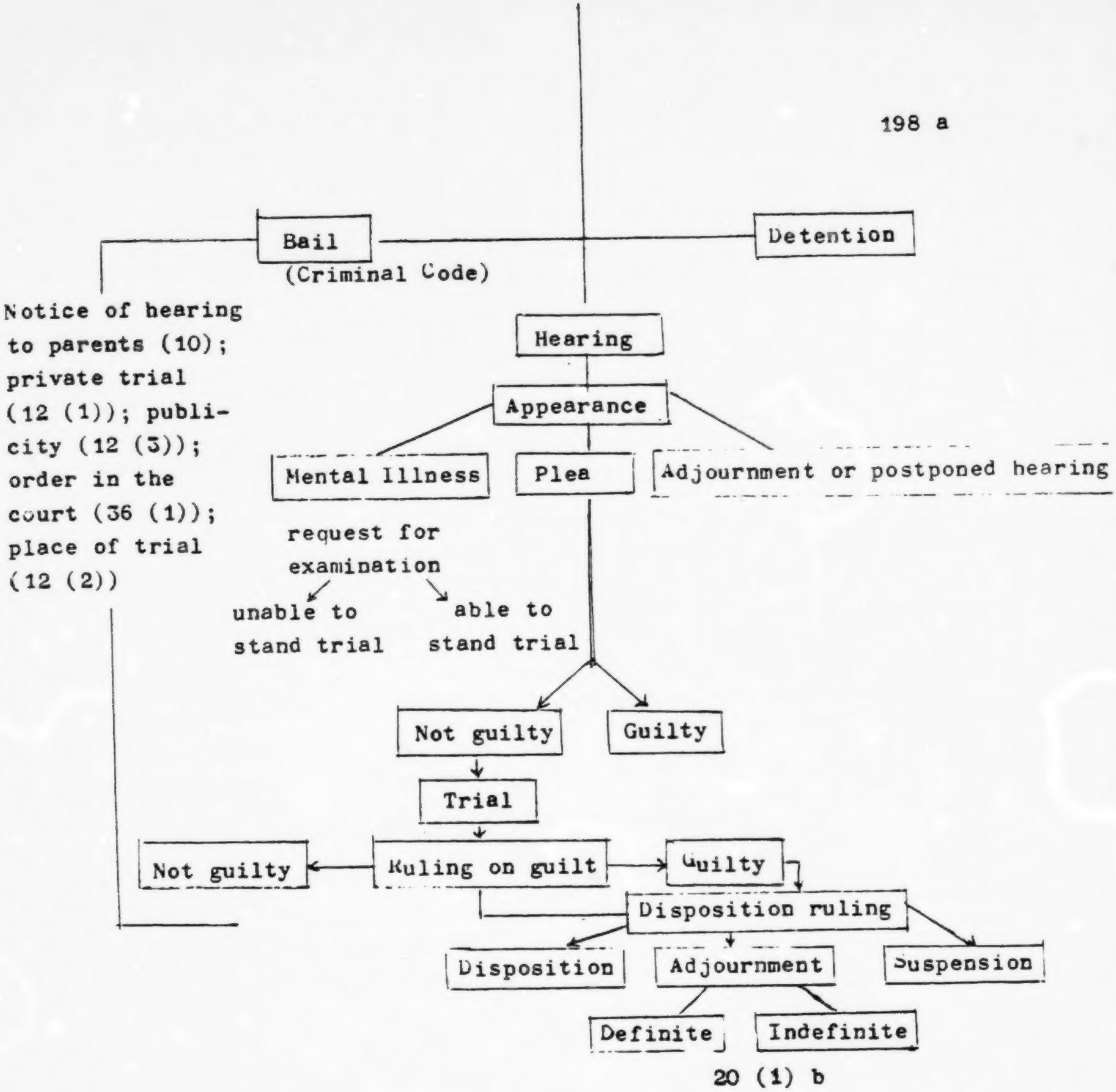
against whom?
-- child: 16 or 18 2
21 20 (3)
-- adult 37
-- parent 20 (2), 22

by whom? -- complainant or the Attorney-General 5 (1), Crim. Code s. 720

before whom? -- the juvenile court 4, 8 except in cases of transfer (9)

procedure: informal 5, 17

(Cont'd)


Bail
(Criminal Code)
Detention
Notice of hearing to parents (10); private trial (12 (1)); publicity (12 (3)); order in the court (36 (1)); place of trial (12 (2))
Hearing
Appearance
Mental Illness
Plea
Adjournment or postponed hearing
request for examination
unable to stand trial
able to stand trial
Not guilty
Guilty
Trial
Not guilty
Ruling on guilt
Guilty
Disposition ruling
Disposition
Adjournment
Suspension
Definite
Indefinite
20 (1) b

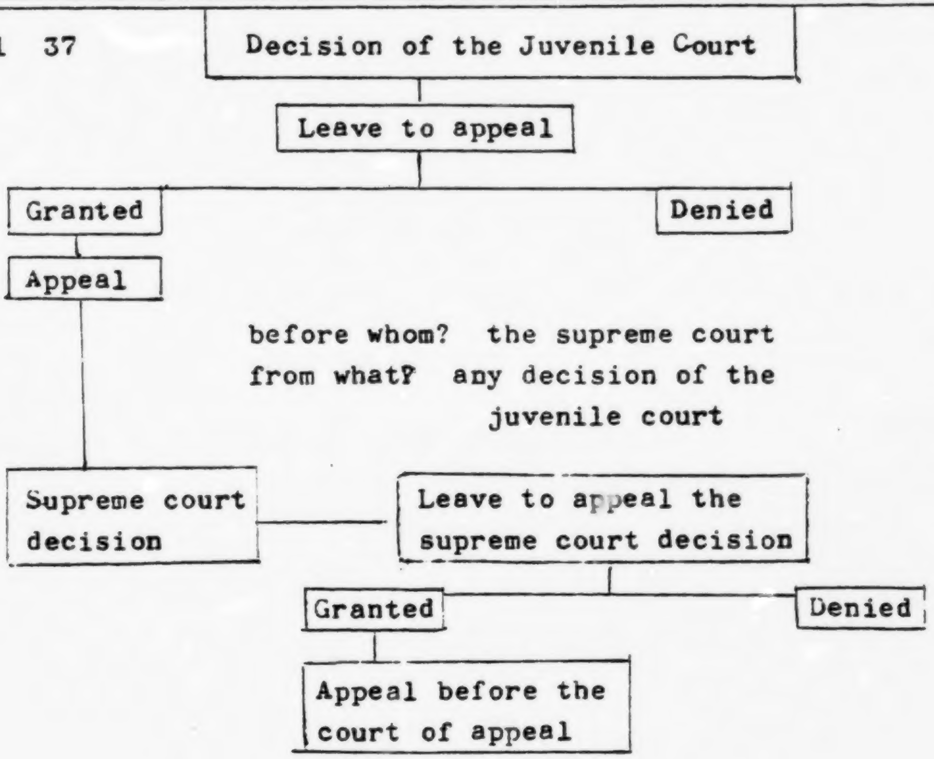
(cont'd)

- Fine: children 20 (1) c
  parents 22 (1)
- Probation 20 (1) d
- Placement in a home 20 (1) e
- Placement in a family 20 (1) f
- Custody of the Children's Aid Society 20 (1) h
- Sent to an Industrial School 20 (1) i, 25
- Support from parents and municipality 20 (2)

Provincial jurisdiction

and all other conditions 20 (1) g
Section 9 (transfer) may be applied at any time
Return of the delinquent to the court 20 (3)

Appeal 37


Decision of the Juvenile Court
Leave to appeal
Granted
Denied
Appeal
Supreme court decision
Leave to appeal the supreme court decision
Granted
Denied
Appeal before the court of appeal

before whom? the supreme court
from what? any decision of the juvenile court

Bibliography

Bellomo, J. Jerald (1972). "Upper Canadian attitudes towards crime and punishment (1832-1851)." Ontario History, LXIV, No. 1, 11.

Catton, K., and Erickson, P. (1973). "Pilot study: the juvenile's perception of the role of defence counsel in juvenile court." Unpublished paper, Centre of Criminology, University of Toronto.

Chapman, P.R. (1971). "The lawyer in juvenile court: 'A Gulliver among Lilliputians'." Western Ontario Law Review, 10, 88.

Conly, Dennis (1976). "The abolition of the training school: response to juvenile delinquency." Unpublished report, Carleton University, Ottawa.

Dootjes, I., Erickson, P., and Fox, R.G. (1972). "Defence counsel in juvenile court: a variety of roles." Canadian Journal of Criminology and Corrections, 14, 132.

Erickson, Patricia (1973). "The role of defence counsel in juvenile court as perceived by judges and social workers." Ms. submitted to the University of Toronto Law Journal on Aug. 24, 1973.

Gagnon, Danièle (1976). "Rapport des principales décisions judiciaires relatives à la loi sur les jeunes délinquants." Report prepared for the Solicitor-General of Canada, Ottawa.

Grygier, T. (1971). "Juvenile Justice in Europe: implications for Canada." Report presented to the Congress of Criminology, Ottawa.

Houston, Susan E. (1972). "Victorian origins of juvenile delinquency: a Canadian experience." History of Education Quarterly (Special issue), 254.

In re Gault, Supreme Court of the United States, 1967. 387 U.S. 1, 87 S. CT. 1428, 18 L. ED. 2d 527.

Johnston, Greg (1964). "The function of counsel in juvenile court." Osgoode Hall Law Journal, 7 (No. 2), 199.

Kelso, J.J. (1907). "Delinquent Children." *The Canadian Law Review*, 6 (3), 106.

Kelso, J.J. (1908). "Children's Courts." *The Canadian Law Times and Review*, 28 (3), 163.

Langley, Michael (1975-76). "Juvenile Justice: what is it?" *Criminology Made in Canada*, 3 (Nos. 1-2), 17.

236 Leon, Jeffrey (1975). "Helping and controlling the development of a Canadian policy to regulate the delinquent behaviour of children." Paper presented at the annual meeting of the Canadian Sociology and Anthropology Association, Edmonton.

MacDonald, John (1964-65). "Juvenile court jurisdiction." *Criminal Law Quarterly*, 7, 426.

McGrath, W.T. (1961-62). "Some suggested amendments to Canada's Juvenile Delinquents Act." *Criminal Law Quarterly*, 4, 259.

Platt, Anthony (1969). *The Child Savers: the Invention of Delinquency*. Chicago: the University of Chicago Press.

Préfontaine, Daniel C. (1975). "Observations on the development of juvenile justice in Canada." Text of an address presented at the 1975 annual meeting of the American Society of Criminologists on Oct. 31, in Toronto.

Rivet, M., and Marceau, B. (1974). "Le tribunal pour jeunes délinquants: sa juridiction et sa procédure." Unpublished paper, Faculty of Law, Laval University, Quebec City.

Scott, W.L. (1908). "The Juvenile Delinquent Act." *The Canadian Law Times and Review*, 28 (11), 892.

Splane, Richard B. (1965). *Social Welfare in Ontario 1791-1893.* Toronto: the University of Toronto Press.

Steinberg, David M. (1974). "Children's Rights." *Chitty's Law Journal*, 22 (No. 7), 238.

Stewart, Lorne (1971). "The development of juvenile justice in Canada."

Sutherland, Neil (1976). Children in English-Canadian Society: Framing the Twentieth-century Consensus. Toronto: the University of Toronto Press.

Valois, Pierre-O. (1975). "L'avocat de la défense et le bien du jeune délinquant." Barreau 75, 7 (No. 9), 21-22.

Wilkins, Leslie T. (1974). "Crime and the Tender-minded." Criminology Made in Canada, 1-2, 107.

* * * * * *